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I. INSURERS' BAD FAITH HANDLING OF FIRST PARTY CLAIMS: A NEW CAUSE OF ACTION IN TORT

In *Nichols v. State Farm Mutual Automobile Insurance Co.*,¹ the South Carolina Supreme Court recognized a cause of action in tort for bad faith in an insurer's handling of a first party claim.² Mr. Nichols' 1969 Corvette, a collector's item, was stolen from behind the federal courthouse in Columbia, South Carolina.³ Nichols, the plaintiff, complained of his theft insurer's failure to deal in good faith in processing his claim.⁴ This cause of action was first recognized by the Supreme Court of California in *Gruenberg v. Aetna Life Insurance Co.*⁵ More recently, in *Robertson v. State Farm Mutual Automobile Insurance Co.*,⁶ the Federal District Court for the District of South Carolina predicted that such an action would be recognized by the South Carolina court.

As did the *Gruenberg* and *Robertson* courts, the South Carolina Supreme Court in *Nichols* based its decision on an "implied covenant of good faith and fair dealing that neither party

1. 279 S.C. 336, 306 S.E.2d 616 (1983).

2. For a full discussion of the theories underlying this decision, see *infra* at p. 279.

3. Record at 20.

4. Record at A14-18.

5. 9 Cal.3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

6. 464 F. Supp. 876 (D.S.C. 1979); see also Business Law, Annual Survey of South Carolina Law, 32 S.C.L. Rev. 1 (1980).

will do anything to impair the other's rights to receive benefits under the contract."⁷ The court further stated that this duty is merely another aspect of the duty which gives rise to a cause of action for unreasonable failure to settle a third party claim within policy limits, as set forth in *Tyger River Pine Co. v. Maryland Casualty Co.*⁸

The "Tyger River Doctrine," however, is based on the insurer's fiduciary duty to represent and defend the insured in an action by a third party.⁹ No such relationship exists between the parties in a case such as *Nichols*. The dispute in *Nichols* was between two contracting parties. It is thus difficult to extrapolate an implied covenant of good faith and fair dealing between the parties to a contract from a fiduciary duty to act reasonably when representing the interests of an insured. Both duties, however, arise from a policy of consumer protection.

In addition, there is ample support for implying a covenant of good faith into insurance contracts. As the court in *Nichols* points out, it has long been recognized that insurance contracts are "affected with a public interest."¹⁰ It has also long been recognized that there is a large disparity between the relative bargaining powers of parties to an insurance contract. "An insured does not contract to obtain any kind of commercial advantage or leverage but only to protect himself against accidental [or unavoidable] loss."¹¹ Thus, while *Nichols* cannot be viewed merely as an extension of the Tyger River Doctrine, the decision in *Nichols* is consistent with prior case law in South Carolina.¹²

Although the South Carolina Supreme Court reiterated, in *Carter v. American Mutual Fire Insurance Co.*,¹³ its recognition

7. 279 S.C. at 339, 306 S.E.2d at 618; see also 9 Cal.3d at 573, 510 P.2d at 1037, 103 Cal. Rptr. at 485.

8. 279 S.C. at 339-40, 306 S.E.2d at 619 (referring to *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346 (1933)). An action under the "Tyger River Doctrine" allows the insured to recover damages in excess of policy limits for which he was held personally liable when the insurer unreasonably refuses to settle within policy limits. See also *Miles v. State Farm Mut. Ins. Co.*, 238 S.C. 374, 120 S.E.2d 217 (1961).

9. 170 S.C. at 292, 170 S.E. at 348.

10. 279 S.C. at 340, 306 S.E.2d at 619; see, e.g., *Hinds v. United Ins. Co. of Am.*, 248 S.C. 285, 149 S.E.2d 771 (1966).

11. 279 S.C. at 340, 306 S.E.2d at 618 (quoting *Trimper v. Nationwide Ins. Co.*, 540 F. Supp. 1188, 1193 (D.S.C. 1982)).

12. See, e.g., cases cited *supra* notes 6, 9 & 10.

13. 279 S.C. 367, 307 S.E.2d 225 (1983). In *Carter*, the trial judge sustained the insurer's demurrer prior to the decision in *Nichols*. The South Carolina Supreme Court,

of a cause of action for bad faith refusal to pay first party benefits, in a companion case, *Diane Carter v. American Mutual Fire Insurance Co.*,¹⁴ the court limited standing in such an action to a named insured or a party to the insurance contract.¹⁵ Thus, although an action for bad faith refusal to pay insurance benefits is an action in tort, standing to bring such an action has been limited by the terms of the insurance contract. This limitation is consistent with the basis of the action because the duty to act in good faith is an implied contractual duty owed only to those who are parties to the contract.¹⁶

Unfortunately, the court in *Nichols* failed to adequately define "bad faith" in the context of this action. The court said only that recovery may be had if the insured can demonstrate bad faith or unreasonable action in processing the claim.¹⁷ Thus, it is difficult to predict the standard of behavior required by *Nichols* to avoid liability. The court in *Nichols* did, however, give two indications of what may constitute bad faith. First, in the somewhat abbreviated discussion of the trial court's refusal to charge that the insurer's actions could not be in bad faith if its actions were within its legal rights, the court said that the issue was not the insurer's right to take the action,¹⁸ but whether in taking that action the insurer demonstrated bad faith.¹⁹ Second, the supreme court approved the trial court's charge that negligence could constitute bad faith,²⁰ stating that "the jury is entitled to consider negligence on the issue of unreasonable refusal to pay benefits."²¹ The court, however, did not indicate whether mere negligence, standing alone, will support an action of this kind. Two recent California cases may help illuminate the definition

relying on *Nichols*, reversed the demurrer to the cause of action. *Id.* at 368, 307 S.E.2d at 226.

14. 279 S.C. 368, 307 S.E.2d 227 (1983).

15. The plaintiff in *Diane Carter* alleged that the unreasonable conduct of the insurer of the family home, which was titled in her husband's name, had damaged her inchoate dower interest in that home. The trial court sustained the defendant's demurrer, and the supreme court affirmed. *Id.* at 369, 307 S.E.2d at 227. The court refused to extend the *Nichols* cause of action "to a person who is not a party to or a named insured under the insurance contract. . . ." *Id.* at 370, 307 S.E.2d at 227.

16. 9 Cal.3d 566, 576, 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 486.

17. 279 S.C. at 342, 306 S.E.2d at 620.

18. *Id.* At issue was the insurer's nonrenewal of the insured's policy.

19. *Id.*

20. *Id.*

21. *Id.* The court cites *Tyger River* and *Robertson*.

of bad faith that will be applied in South Carolina actions for unreasonable refusal to pay first party benefits. First, in *Johanson v. California State Auto Association Inter-Insurance Bureau*,²² the California court apparently adopted a standard of strict liability in third party excess liability cases. The court in *Johanson* held that although the insurer's refusal to settle a claim within policy limits may stem from the good faith belief that coverage does not exist, "an insurer who denies coverage does so at its own risk."²³ If the denial is wrongful, the insurer may be liable for damages in tort.²⁴ Similarly, in *Neal v. Farmers Insurance Exchange*,²⁵ the California Court of Appeal found that the insurer's lack of a colorable defense was bad faith in and of itself.²⁶

The standard of conduct in South Carolina may prove to be that applied by the district court in *Robertson* and in *Trimper v. Nationwide Insurance Co.*²⁷ In *Robertson*, Judge Blatt held that an insured is entitled to recover tort damages upon a showing that the insurer's failure to pay was "willful, or in reckless disregard of [the insured's] rights."²⁸ The court cited with approval the Seventh Circuit case of *Craft v. Economy Fire and Casualty Co.*,²⁹ which held that the insured need only show a lack of reasonable cause for denial.³⁰ More recently, the district court in *Trimper* held that an insured must show "the absence of a reasonable basis for the denial of benefits, and the insurer's knowl-

22. 15 Cal.3d 9, 538 P.2d 744, 123 Cal. Rptr. 288 (1975).

23. *Id.* at 13, 538 P.2d at 748, 124 Cal. Rptr. at 292 (quoting *Commune v. Traders & General Ins. Co.*, 50 Cal.2d 654, 660, 328 P.2d 198, 202 (1958)). See Zurek, *First Party Insurance: Claims, Practices and Procedures in Light of Extra-Contractual Damage Actions*, 27 DRAKE L. REV. 666, 674 (1978).

24. 15 Cal.3d at 13, 538 P.2d at 748, 124 Cal. Rptr. at 292.

25. 64 Cal. App.3d 966, 135 Cal. Rptr. 105 (1976), *vacated* 68 Cal. App.3d 422, 137 Cal. Rptr. 660 (1977), *vacated* 21 Cal.3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978).

26. 21 Cal.3d at 921, 582 P.2d at 985, 148 Cal. Rptr. at 394. The court in *Neal* also stated that the "terms of 'good faith' and 'bad faith' . . . are not meant to connote the absence or presence of positive misconduct of a malicious or immoral nature." *Id.* at 921 n.5, 582 P.2d at 986 n.5, 148 Cal. Rptr. at 395 n.5. That type of misconduct is more properly considered in the determination of liability for punitive damages. See Zurek, *supra* note 23, at 675.

27. 540 F. Supp. 1188 (D.S.C. 1982). See *supra* text accompanying notes 6 & 11.

28. 464 F. Supp. at 884.

29. 572 F.2d 565 (7th Cir. 1978).

30. *Id.* at 573. Thus, the burden in *Craft* seems lighter than that in *Robertson* which purports to follow *Craft*. The court in *Craft* also stated that punitive damages could be awarded for "fraud, malice, gross negligence [and] oppressive conduct." *Id.* at 574.

edge or reckless disregard of a reasonable basis for the denial.”³¹

An insurer's actions have been held to be reasonable where a valid defense may be asserted,³² where there exists a “good faith legal controversy”³³ or a legitimate question of statutory construction or constitutional law, or where there is a bona fide factual uncertainty.³⁴ As stated by the court in *Noble v. National American Life Insurance Co.*,³⁵ in order to recover for breach of the insurer's duty of good faith, the insured must show that no reasonable basis existed for denying benefits. The finding of unreasonableness in *Gruenberg* was based upon the insurance adjuster's erroneous charges of arson and the insurer's refusal to settle even after the insured was cleared of these charges.³⁶ Similarly, liability for compensatory damages in *Neal* was founded on the insurer's failure to settle when no colorable defense existed.³⁷ In both those cases, as in *Nichols*, the insurer's delay was also a factor.

As pointed out earlier, the court in *Nichols* provides little guidance in determining what constitutes bad faith or unreasonable behavior. However, the jury must ultimately decide whether the insurer's actions violated its duty to deal in good faith. Therefore, “[t]he test of what behavior is reasonable [will] not be based on what the insurer considers reasonable . . . but, rather, on what a reasonable person in the position of the insured would have understood the contract to mean.”³⁸

In addition to consequential damages in a *Nichols* action, an insurer may be liable for punitive damages as well.³⁹ If the insured can show that the “insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive

31. 540 F. Supp. at 1194.

32. See *Crawler Supply Co. v. Bituminous Casualty Corp.*, 391 So.2d 1223 (La. Ct. App. 1980).

33. See *Anderson v. Nationwide Life Ins. Co.*, 6 Kan. App.2d 163, 170, 627 P.2d 344, 349 (1981). See also *Wiggins v. Travelers Ins. Co.*, 498 F. Supp. 211 (D.S.C. 1979), *aff'd*, 636 F.2d 1215 (4th Cir. 1980).

34. See *Liddell v. Detroit Auto. Inter-Ins. Exch.*, 102 Mich. App. 636, 302 N.W.2d 260 (1981).

35. 128 Ariz. 188, 624 P.2d 866 (1981).

36. 9 Cal.3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

37. 21 Cal.3d at 921, 582 P.2d at 985, 148 Cal. Rptr. at 394.

38. Zurek, *supra* note 23, at 678.

39. 279 S.C. at 340, 306 S.E.2d at 619.

damages.”⁴⁰ This holding is consistent with that of *Silberg v. California Life Insurance Co.*,⁴¹ a California case decided shortly after *Gruenberg*. The *Silberg* court held that an insured must show that the insurer acted with the “intent to vex, injure or annoy, or with a conscious disregard of the [insured’s] rights.”⁴²

The standard for the recovery of punitive damages announced in *Nichols* does seem to fall short of the burden of proof traditionally borne by the insured under the doctrine of *Wellborn v. Dixon*⁴³ for recovery of punitive damages in an action for breach of contract accompanied by fraud. It is therefore clear that the cause of action recognized in *Nichols* supplants the common law action for punitive damages for breach of contract and fraud. It also appears to supplant the statutory action under South Carolina Code section 38-9-320,⁴⁴ which provides for the recovery of attorney’s fees for failure of an insurer to act reasonably in settling a claim.

Professor Zurek has suggested a procedure to be followed by insurers who have reason to dispute a claim.⁴⁵ He suggests that a claim file containing all information pertinent to the claim be carefully maintained and developed with a view towards litigation. Zurek also suggests that all correspondence from an insured be dealt with promptly and that insurers should document, at a minimum, a sound reason for denying any claim. In personal injury or disability cases, an independent physician’s report is also well advised. Professor Zurek emphasizes the importance of “educating claims personnel to recognize burgeoning bad faith claims.”⁴⁶ This common sense approach to avoiding bad faith claims should help insulate insurers from potential liability, however arbitrary the definition of bad faith may be.

The supreme court’s decision in *Nichols* will undoubtedly affect the insurance industry in South Carolina. The appellant

40. *Id.*

41. 11 Cal.3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

42. *Id.* at 462, 521 P.2d at 1110, 113 Cal. Rptr. at 718.

43. 70 S.C. 108, 49 S.E. 232 (1904). Under *Dixon*, the insured must prove actual fraud to recover punitive damages. *Id.* at 115-18, 49 S.E. at 234-35. See also Thompson v. Home Sec. Life Ins. Co., 271 S.C. 54, 244 S.E.2d 533 (1978), and cases cited therein.

44. S.C. CODE ANN. § 38-9-320 (1976). This Code section limits recovery to \$2,500.

45. Zurek, *supra* note 23, at 677-84.

46. *Id.* at 682.

suggested that recognizing a cause of action in tort for unreasonable failure to settle a first party claim would "drastically increas[e] litigation."⁴⁷ However, only a small percentage of insurance claims are not promptly settled; due to crowded dockets and indefinite delay, there appears to be little incentive to litigate most claims.⁴⁸ The primary impact of the *Nichols* cause of action is likely to be that most litigated claims will be brought seeking compensatory damages in tort, rather than only the more limited contractual awards available in a contract action. In fact, it is arguable that the prospect of compensatory and punitive damages may actually decrease litigation. Until now, the delay involved in litigating an insurance claim has often worked in favor of the insurer⁴⁹ by forcing the insured to settle out of economic necessity. Furthermore, the insurer has had little to lose in litigation because damages have been limited to contractual damages, with the possibility of liability for attorney's fees if the refusal to settle was in bad faith,⁵⁰ and the remote possibility of punitive damages if the insured was able to prove fraud.⁵¹ Therefore, a cause of action in tort may prove to be a disincentive to litigation because insurers now have a strong motive to settle.⁵²

The most telling effect of the *Nichols* decision is likely to be increased damage awards when claims are litigated.⁵³ In *Nichols*, the insured had suffered approximately two thousand dollars in actual damages.⁵⁴ The jury, however, awarded a total of \$30,000, which was reduced by the trial court to \$20,000.⁵⁵ It is therefore necessary for insurance companies and, in particular, claims adjusters, to realize the full import of failure to act reasonably in settling first party claims. Tactics that may have been accepted ways of doing business in the past may now subject the insurer to liability for compensatory awards, and possible punitive dam-

47. Brief of Appellant at 29.

48. Amicus Curiae Brief of the South Carolina Trial Lawyers Association at 14.

49. See *supra* note 47 and accompanying text.

50. See *supra* note 43.

51. See Amicus Brief of Trial Lawyers, *supra* note 48, at 15; see also *Wellborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904).

52. See Brief of Appellant at 28.

53. *Id.* See, e.g., *Delos v. Farmers Ins. Group*, 93 Cal. App.3d 642, 155 Cal. Rptr. 843 (1979).

54. Record at A-41 to A-52 (estimates of car damage after recovery).

55. Record at A-54 to A-55.

age awards greatly in excess of ordinary contract claims.

There is, however, one question left unanswered. Will this cause of action be limited to insurance contracts, or may anyone who suffers a breach of contract elect to sue in either tort or contract?⁵⁶ In his concurring opinion in *Security Mutual Casualty Co. v. Transport Indemnity Co.*,⁵⁷ Justice Jefferson stated that, "[T]here exists as a part of every contract a covenant of good faith and fair dealing which imposes a duty upon each party not to do anything to injure the right of the other party to receive the benefits of the agreement."⁵⁸ The Uniform Commercial Code provides that, "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."⁵⁹ Thus, it appears that the action recognized in *Nichols* must inevitably expand to all contracts. It has even been argued that a failure to allow such expansion would violate the equal protection clause of the Constitution.⁶⁰ However, as counsel for the South Carolina Defense Trial Attorneys' Association observes, "Protection of the laws is disparate and allowably so in situations where there is a distinguished class and a rational basis for the distinction."⁶¹ The special nature of insurance contracts provides that distinction.⁶² However, the recognition of a cause of action in tort for the wrongful breach of contracts not involving insurance has yet to occur.

In recognizing a cause of action in tort for the bad faith handling of a first party claim, the South Carolina Supreme Court has exposed the insurers in the state to liability in excess of contractual damages when they fail to act in accordance with an implied duty of good faith. This cause of action gives the insured a great deal of new leverage. Prior to *Nichols*, there was

56. See Brief of Appellant at 34-38. See also Amicus Curiae Brief of the South Carolina Defense Trial Attorneys Association at 23.

57. 66 Cal. App.3d 1009, 136 Cal. Rptr. 365 (1977).

58. *Id.* at 1018, 136 Cal. Rptr. at 369 (emphasis in original).

59. S.C. CODE ANN. § 36-1-203 (1976).

60. See also Amicus Brief of Trial Lawyers, *supra* note 48, at 23.

61. Amicus Brief of Defense Attorneys, *supra* note 56, at 22-23.

62. See *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App.3d 376, 89 Cal. Rptr. 78 (1970) and cases cited in footnotes 6, 10 & 11. Although the public policy interest in insurance contracts is distinct, other jurisdictions in contract actions not involving insurance have awarded punitive damages for extreme behavior. See generally, J. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES, § 6 (1978 & Supp. 1982) and cases cited therein (although a 1983 edition has been published, these cases are apparently omitted).

little incentive for an insurer to behave reasonably when its maximum exposure was the amount it would have to pay in any case, plus interest and possibly attorney's fees. The *Nichols* cause of action eliminates a great deal of the disparity in bargaining positions between the parties to an insurance contract.

Däna E. Wilkinson

II. AMBIGUITIES OF LIFE INSURANCE POLICIES STRICTLY CONSTRUED AGAINST INSURER

In *Turkett v. Gulf Life Insurance Co.*,⁶³ the South Carolina Supreme Court rejected the "two contract" theory of contract interpretation in dealing with an ambiguous life insurance policy. Although *Turkett* has limited precedential value because of its narrow fact situation, the court's decision indicates that ambiguous insurance policies will continue to be strictly construed against the insurer.⁶⁴

Turkett was an action by the beneficiary of a life insurance policy for the payment of death benefits. The insured had committed suicide. The insurance policy sued upon contained a provision which barred recovery if suicide occurred "within two years from the policy date." The controversy centered on the meaning of the term "policy date."⁶⁵

The application for the policy and the conditional receipt issued for the first premium were dated April 26, 1976. The receipt stated that if the application was approved, the insurance would take effect on the date of the application.⁶⁶ In addition, the application stated that, "[U]nless effective in accordance with the provisions of the conditional receipt, no insurance shall take effect until a policy is actually delivered"⁶⁷

The subsequently issued policy was dated May 18, 1976. This date on the face of the policy was labeled "Policy Date."

63. 279 S.C. 309, 306 S.E.2d 602 (1983).

64. *Id.* at 311, 306 S.E.2d at 603.

65. *Id.* at 310, 306 S.E.2d at 602-03.

66. The conditional receipt stated that if the application were approved, the "insurance should take effect on (a) the date of the application, (b) the date of the last medical examination required by the Company, or (c) the date requested in the application, whichever date is the latest." Alternatives (b) and (c) were not applicable. *Id.* at 311, 306 S.E.2d at 603.

67. *Id.*

The insured committed suicide on April 30, 1978, more than two years from the date of the conditional receipt, but less than two years from the date the policy was issued.⁶⁸

The trial court found the terms of the policy clear and unambiguous, adopting the view that the effective date on the receipt governed only the amount of the plan, the class of risk, and the premium of the insurance.⁶⁹ The "Policy Date" governed other provisions contained in the policy, such as the suicide clause.⁷⁰

The supreme court expressly rejected this "two contract theory," citing *American National Insurance Co. v. Motta*,⁷¹ and *Holtze v. Equitable Life Assurance Society of the United States*.⁷² In both the *Motta* and *Holtze* decisions, it was considered of primary importance that neither party to the insurance contract intended the creation of two separate contracts.⁷³

The decision in *Turkett* is consistent with universal acceptance of the proposition that exclusionary clauses in insurance contracts will be strictly construed against the insurer.⁷⁴ *Turkett* is also consistent with the language of the South Carolina Supreme Court in *Lesley v. American Security Insurance Co.*⁷⁵ and *Columbia College v. Pennsylvania Insurance Co.*⁷⁶ that in interpreting insurance agreements, all related documents, such as an application or binder, must be considered. Thus, the *Turkett* decision is firmly grounded in prior law.⁷⁷ The *Motta*, *Holtze* and *Turkett* line of cases, which focus on the intent of

68. *Id.* at 311, 306 S.E.2d at 602.

69. Record at 45.

70. *Id.* at 53.

71. 404 F.2d 167 (5th Cir. 1968).

72. 276 Md. 681, 351 A.2d 139 (1976).

73. 404 F.2d at 169; 276 Md. at 683, 351 A.2d at 143.

74. *Abernathy v. Prudential Ins. Co. of Am.*, 274 S.C. 388, 264 S.E.2d 836 (1980); *Boggs v. Aetna Casualty and Surety Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979). See also *State Farm Mutual Auto Ins. Co. v. Partridge*, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973); *Richards v. Hanover Ins. Co.*, 250 Ga. 613, 299 S.E.2d 561 (1983); *Brocme v. Allstate Ins. Co.*, 144 Ga. App. 318, 241 S.E.2d 34 (1977); *Thomas J. Lipton, Inc. v. Liberty Mutual Ins. Co.*, 34 N.Y.2d 356, 314 N.E.2d 37, 357 N.Y.S.2d 705 (1974); *Allstate Ins. Co. v. Shelby Mutual Ins. Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967).

75. 261 S.C. 178, 199 S.E.2d 82 (1973).

76. 250 S.C. 237, 157 S.E.2d 416 (1967).

77. See, e.g., cases cited in notes 71 and 72; *Manufacturer's Life Ins. Co. v. Capitol Datsun, Inc.*, 566 F.2d 354 (D.C. Cir. 1977); *Crawford v. Mid-America Ins. Co.*, 488 S.W.2d 255 (Mo. Ct. App. 1972).

the parties, are more solidly founded than those cases adopting the "two contract" theory.⁷⁸ Certainly the application and conditional receipt more accurately reflect the actual intent of the parties than does the policy unilaterally prepared by the insurer.⁷⁹

When the conditional receipt and the policy in *Turkett* are viewed as one contract, there is some ambiguity inherent in the two effective dates, even though the words "Policy Date" actually appear on the policy.⁸⁰ If two separate effective dates were intended, the distinction between them should have been made clear. Any ambiguity in an insurance contract is viewed favorably to the insured; therefore the "Policy Date" in the *Turkett* contract was correctly determined by the court to be the date of the conditional receipt.⁸¹

Däna E. Wilkinson

78. In *Crowley v. Travelers Ins. Co.*, 196 F.2d 315 (5th Cir. 1952), the court adopted the date of the policy as the effective date for the operation of the suicide clause. However, the court stated that the policy date was named as controlling in both the application and the policy. Similarly, in *Davis v. Fidelity Mutual Life Ins. Co.*, 107 F.2d 150 (4th Cir. 1939), the decision was based on an express provision as to the controlling date. Other contrary holdings are attributable to express statutory provisions that a conditional receipt does not constitute part of an insurance contract. See, e.g., *Travelers Ins. Co. v. Summers*, 515 F. Supp. 553 (N.D. Ala. 1981) and *Loyda v. New England Life Ins. Co.*, 409 F. Supp. 754 (D.P.R. 1976). However, at least two courts have adopted the "two contract" theory. See *Oakes v. Franklin Life Ins. Co.*, 516 F. Supp. 445 (E.D. Pa. 1981) and *Byrum v. Equitable Life Assurance Society of U.S.*, 180 F. Supp. 620 (W.D. La. 1959), *aff'd*, 274 F.2d 822 (5th Cir. 1960), *cert. denied*, 363 U.S. 830 (1960).

79. This argument is also made by the Appellant in his brief. Brief of Appellant at 8.

80. The Respondent argued, naturally, that the presence of the words "policy date" on the policy removed any ambiguity. Brief of Respondent at 7.

81. In *Jones v. Security General Life Ins. Co.*, defendant successfully moved to strike the plaintiff's second cause of action which was based on bad faith refusal to pay benefits under a first party contract of insurance. Case No. 83-CP-40-4205 (Court of Common Pleas, Richland County, April 23, 1984). Plaintiff had premised this cause of action on the decision in *Nichols*. The defendant contended that the cause of action first formally recognized in *Nichols* could only be applied prospectively and, as the accident being sued upon occurred prior to the *Nichols* decision, did not apply in the instant case. Judge Kinon analogized the recognition of a new cause of action in tort for bad faith refusal to pay first party insurance benefits to the abrogation of the doctrine of charitable immunity in South Carolina, and held that the cause of action established in *Nichols* is to be applied prospectively.

III. AN INTERPRETATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT IN THE CONTEXT OF THE SHERMAN ANTI- TRUST ACT

The Fourth Circuit, in *Bostick Oil Co. v. Michelin Tire Corp., Commercial Div.*,⁸² interpreted two significant areas of law. First, the decision discussed section 1 of the Sherman Act⁸³ and then, more importantly, interpreted the South Carolina Unfair Trade Practices Act (UTPA).⁸⁴ The case came to the Fourth Circuit on appeal from a directed verdict for Michelin. The court reversed, holding that whether the defendant terminated the plaintiff's contract to further the aims of competing dealers by eliminating a price-cutting rival⁸⁵ and to enforce a price maintenance scheme was an issue of fact.⁸⁶ Concerning the unfair trade practices claim, the court found that federal antitrust law did not preempt the application of the South Carolina UTPA,⁸⁷ nor was any state law exemption available under section 39-5-40(d) of the Act.⁸⁸

Bostick Oil Company, an authorized distributor of Michelin tires, increased its truck tire sales primarily by cutting prices aggressively and giving commission rebates and quantity discounts to its customers.⁸⁹ These sales practices caused competing Michelin dealers to complain to field and district level personnel

82. 702 F.2d 1207 (4th Cir. 1983), *cert. denied*, 103 S. Ct. 176 (1983).

83. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1976).

84. S.C. CODE ANN. §§ 39-5-10 to -160 (1976 & Supp. 1983).

85. 702 F.2d at 1215. Michelin alleged that the termination was in response to Bostick's failure to provide service facilities for its customers as required by the dealership agreement. *Id.*

86. *Id.* at 1217-18.

87. *Id.* at 1219.

88. *Id.* S.C. CODE ANN. § 39-5-40(d) specifically states:
Nothing in this article shall apply to:

. . .

(d) Any challenged practices that are subject to, and comply with, statutes administered by the Federal Trade Commission and the rules, regulations and decisions interpreting such statutes.

For the purpose of this section, the burden of proving exemption from the provisions of this article shall be upon the person claiming the exemption.

S.C. CODE ANN. § 39-5-40(d)(1976).

89. 702 F.2d at 1211.

of Michelin.⁹⁰ In May 1977, shortly before the renewal date of Bostick's dealership contract, Michelin's district manager approached Joe Bostick about enrolling in Michelin's new "National Accounts" program (NAP).⁹¹ Michelin renewed the dealership contract only after Bostick joined the NAP.⁹²

Bostick continued its aggressive sales practices under the NAP, giving rebates as high as 15 percent. Complaints from rival dealers persisted and, in April 1978, Michelin representatives notified Joe Bostick that his truck tire dealership would not be renewed. Bostick then brought this action.

Bostick relied on two theories to maintain its Sherman Act claim. The first theory alleged that the dealership was terminated by Michelin in response to the complaints of competitors, who resented Bostick's aggressive price-cutting. Bostick maintained that this action constituted an unlawful conspiracy. In addition, Bostick argued that the NAP was a resale price maintenance scheme, the enforcement of which required Michelin to terminate a dealership that continued to lower the manufacturer-imposed minimum price for its customers. Bostick also alleged unfair or deceptive trade practices by Michelin, in violation of the South Carolina UTPA.⁹³ At the close of Bostick's case the district court granted Michelin's motion for a directed verdict and Bostick appealed, contending that there was suf-

90. *Id.* The complaints ultimately reached Michelin's vice president of sales, who sent a corporate sales manager to talk with Joe Bostick in April 1976. The meeting ended with a renewal of Bostick's dealership for the next year and possibly a promise by Bostick to expand his service facilities. The complaints from dealers persisted.

91. *Id.* at 1211-12. The NAP involved various large-volume purchasers designated "national accounts" who were billed, and whose accounts were collected centrally through Michelin, while distributors continued to do the actual selling and delivery of tires for which they were paid a commission. The distributor was required to disclose his customer lists to Michelin and was not allowed to quote a price for the tires.

92. *Id.* at 1212. Joe Bostick later testified that he felt "intimidated" into joining the NAP. Evidence to support this contention included a recommendation by Michelin's district manager to Michelin management that Bostick's dealership not be renewed, followed by a report expressing optimism that the NAP would alleviate the problem of "wholesaling and dropping off" by dealers like Bostick, who was identified as a "pressing problem." *Id.* Evidence also showed that, despite Bostick's repeated inquiries about renewal, the regular dealership expired during negotiations over Bostick's participation in the NAP. The dealership was renewed one week after Bostick made the first sale through the program. *Id.*

93. S.C. CODE ANN. § 39-5-20(a)(1976 & Supp. 1983). This Code section states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

ficient evidence for these issues to be submitted to a jury.⁹⁴

A. *Sherman Act Violation*

Prerequisite to section 1 liability is a “contract, combination, . . . or conspiracy” which is unreasonably “in restraint of trade.”⁹⁵ Specifically, on remand Bostick must offer evidence to prove that concerted action existed between Michelin and its dealers, and that Bostick’s truck tire dealership was terminated “in furtherance of competitors’ desires to eliminate a price-cutting rival.”⁹⁶

“Mere complaints do not a conspiracy make.”⁹⁷ However, the court determined that Bostick had shown more than unilateral action by Michelin.⁹⁸ The court made an analogy to *Donald B. Rice Tire Co. v. Michelin Tire Corp.*,⁹⁹ in which it addressed the basis upon which the trier of fact could find the “‘requisite degree of involvement of other parties’ to infer a conspiracy under *United States v. Parke Davis & Co.*”¹⁰⁰ In *Rice*, the court affirmed the district court’s finding of a “combination” despite the absence of any formal agreement between the manufacturer and the dealers, and despite the absence of evidence that competitors had ever been consulted by Michelin after complaining about Rice.¹⁰¹ In *Bostick*, Michelin’s argument supported the

94. 702 F.2d at 1209-10.

95. 15 U.S.C. § 1 (Supp. 1984).

96. 702 F.2d at 1215.

97. *Id.* at 1213 (citing *H.L. Moore Drug Exchange v. Eli Lilly and Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) and *Roesch, Inc. v. Star Cooler Corp.*, 514 F. Supp. 890 (E.D. Mo. 1981), *aff’d*, 671 F.2d 1168 (8th Cir. 1982)).

98. 702 F.2d at 1213. The testimony of Michelin’s sales vice president showed personal knowledge of the controversy between Joe Bostick and Michelin’s district manager over Bostick’s pricing practices and knowledge of the complaints by Bostick’s rival dealers. It can be inferred that the actions taken by local officials to put pressure on Bostick resulted from directions given by the vice president to take some action in response to the complaints. *Id.* at 1214.

99. 638 F.2d 15 (4th Cir. 1981), *cert. denied*, 454 U.S. 864 (1981).

100. *Id.* at 16 (quoting *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 753-54 (D. Md. 1980)). The court in *Bostick* omits the citation for *United States v. Parke Davis & Co.*, 362 U.S. 291 (1960) which held a drug manufacturer to be the organizer of a price maintenance conspiracy where the manufacturer began a program that demanded compliance with its suggested retail prices and, not content with merely refusing business relations with any retailer who disregarded the policy, refused to deal with wholesalers in order to pressure them into enforcing the manufacturer’s policies.

101. 638 F.2d at 16. The fact that the competitors of Rice had never been consulted

idea that the termination was more than unilateral, since Michelin admitted that it was responding to the complaints of other dealers when it terminated Bostick's dealership.¹⁰²

Other circuits have found section 1 liability upon little more than termination of a dealer. The Fourth Circuit favorably cited *Spray-Rite Service Corp. v. Monsanto Co.*,¹⁰³ a Seventh Circuit decision, which held "that proof of termination following competitor complaints is sufficient to support an inference of concerted action."¹⁰⁴ In a footnote, the court in *Bostick* distinguished its holding from that of *Girardi v. Gates Rubber Company Sales Division, Inc.*¹⁰⁵ and from those of other cases which have seemingly rejected *Girardi*.¹⁰⁶ The court affirmed the principle that complaints in addition to "such other evidence as we find here will be enough to raise an issue of fact regarding [section] 1 concerted activity."¹⁰⁷

On remand, once the existence of a conspiracy has been established, Bostick must show that the conspiracy was "in restraint of trade."¹⁰⁸ The court, relying on *Rice*, concluded that a finding of a per se violation of section 1 would result from a fac-

by Michelin is mentioned in *Bostick*, 702 F.2d at 1214, but is not mentioned in *Rice* by the court of appeals or the district court. Also, evidence at the trial in *Rice* indicated that the only complaints were those of rival tire dealers about plaintiff's wholesaling practices. No other types of complaints from any other sources about any other facets of Rice's business were received before the decision not to renew. 483 F.Supp. at 754.

102. 702 F.2d at 1214. See *supra* note 98.

103. 684 F.2d 1226 (7th Cir. 1982).

104. *Id.* at 1238. In March of 1984, the United States Supreme Court decided *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). The Supreme Court rejected the assertion by the Seventh Circuit Court of Appeals that an antitrust plaintiff could survive a directed verdict on showing that termination of a distributor by a manufacturer was in response to dealers' complaints. The Court did affirm the judgment of the appeals court, but held that something more than evidence of complaints was needed. On the facts in *Monsanto*, there was sufficient evidence for the jury to have found a conspiracy between Monsanto and its distributors. In *Bostick* there was also more than mere complaints.

105. 325 F.2d 196 (9th Cir. 1963).

106. See, e.g., *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d at 1172; *E.J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 478 F. Supp. 243, 256 (E.D. Pa. 1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

107. 702 F.2d at 1215 n.12. The Fourth Circuit refused to adopt the expansive reading of *Girardi*, that a presumption of conspiracy is created whenever distributors' complaints are followed by a manufacturer's termination of the offending dealer, and emphasized that courts which have seemingly rejected *Girardi* have criticized this expansive view. The narrow view accepted by the court in *Bostick* has been preserved. *Id.*

108. 15 U.S.C. § 1 (1976).

tual determination that Michelin terminated Bostick's dealership to further the desires of rival dealers to eliminate a price-cutting rival.¹⁰⁹ The court reasoned that there is no need to apply the "rule of reason" analysis, proper when considering manufacturer-imposed vertical restrictions, to a situation in which the facts indicate a horizontal conspiracy, per se illegal, among competing dealers and the manufacturer.¹¹⁰

Under Bostick's second theory of liability, the court reached the conclusion that the National Accounts program satisfied the concerted action requirement of section 1, since a contractual agreement between the manufacturer and the dealers actually existed.¹¹¹ Based on the evidence, the court held that the district court was wrong in finding that the program fell short of a per se illegal resale price maintenance arrangement. The court criticized the finding of "voluntariness," demonstrating that Bostick's participation in the program was hardly voluntary.¹¹² The court noted Michelin's attempt to use the program as a form of control over the ultimate sales price.¹¹³ Seemingly, Michelin "has taken on this role of a regulator of the horizontal competition among otherwise legally distinct dealerships selling tires they legally own."¹¹⁴ If this were found to be true, the plan would be per se unlawful.¹¹⁵

109. 702 F.2d at 1215. The court in *Rice* defined a horizontal conspiracy as one "among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers" and, as such, would be illegal. A vertical conspiracy is one "involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased interbrand competition," and is analyzed under the rule of reason test. 638 F.2d at 16.

110. 702 F.2d at 1216. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the United States Supreme Court supplied three rationales to justify manufacturer-imposed restrictions that would enhance interbrand competition at the expense of lessened intrabrand competition. These are as follows: (1) inducing aggressive retailers to become dealers to enhance the manufacturer's likelihood of successful entry into a new market; (2) stemming the "free rider" effect; (3) assuming direct manufacturer oversight of quality and safety to lessen product liability exposure. One of these benefits must be shown before a manufacturer-imposed restraint will be analyzed by the "rule of reason." Thus, Michelin could still show one of these to be applicable, as it did in *Rice*, and overcome the label. 702 F.2d at 1216 n.15. The court does not explain the "rule of reason" analysis.

111. 702 F.2d at 1216.

112. *Id.* at 1216-17.

113. *Id.* at 1217.

114. *Id.* at 1218.

115. *Id.* "Price maintenance schemes have been consistently condemned as illegal,

The Fourth Circuit, in its analysis of the antitrust claims, defined the elements of a "conspiracy" under the Sherman Act. It tried to steer a path between cases that refuse to recognize complaints alone as enough to establish a conspiracy, and cases, such as *Spray-Rite*, that recognize the sufficiency of complaints alone to support an inference of concerted action.¹¹⁶ The court found more than dealer complaints to support Bostick's conspiracy allegation, including other evidence that would at least be enough to raise an issue of fact to overcome a directed verdict. The court did not apply the per se doctrine as rigidly as it could have since it left the possibility that, under certain rationales, Michelin could overcome the per se label.¹¹⁷ This imposes a heavy burden on Michelin, as the manufacturer-supplier, to show that its scheme will benefit its interbrand competitiveness rather than its dealers.

B. South Carolina Unfair Trade Practices Act Violation

Bostick alleged that Michelin's practices also violated section 39-5-20(a) of the South Carolina Code, which states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."¹¹⁸ The district court suggested that federal law preempted application of the South Carolina Unfair Trade Practices Act (UTPA). The Fourth Circuit disagreed, finding nothing in the history of federal antitrust regulation that suggested Congress intended to displace state regulation of unfair trade practices.¹¹⁹

The district court also found that section 39-5-40(d)¹²⁰ exempted from its coverage all federally regulated conduct. How-

. . . and are not saved by claims of redeeming interbrand virtues. . . ." *Id.* at 1217. See *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958), where the Court states "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 5. Horizontal price maintenance schemes fall into the above definition.

116. See *supra* notes 103-07 and accompanying text.

117. See *supra* note 110.

118. S.C. CODE ANN. § 39-5-20(a)(1976).

119. 702 F.2d at 1219.

120. For the text of § 39-5-40(d), see *supra* note 88.

ever, the Fourth Circuit disposed of this contention by noting that the language in section 39-5-40(d) requires the party claiming the exemption to raise it as an affirmative defense, which Michelin failed to do. When raised on motion for a directed verdict, the defense is untimely.¹²¹ The court considered Michelin's assertion of the exemption to be a timely defense of failure to state a claim upon which relief can be granted. Nevertheless, the court determined that the exemption was inapplicable to Michelin, because Michelin did not show FTC approval of its manner of dealer termination. The court held instead that section 39-5-40 covers activity given a blanket exemption or endorsement by federal law.¹²²

In interpreting section 39-5-40, the court of appeals relied mainly on two South Carolina Supreme Court decisions, *State ex rel. McLeod v. Rhoades*¹²³ and *State ex rel. McLeod v. Fritz Waidner Sports Cars, Inc.*,¹²⁴ both of which discussed section 39-5-40(a). Since section 39-5-40(d) had yet to be interpreted, the court of appeals used the South Carolina court's interpretation of section 39-5-40(a) as guidance on the scope of the entire section. The court of appeals viewed section 39-5-40(a) as a broader provision than section 39-5-40(d), and reasoned that if Bostick's claims were not exempt under section 39-5-40(a), they would certainly fail to meet the stricter demands of section 39-5-40(d).¹²⁵

In *Rhoades*, the court interpreted the words "conduct permitted" in section 39-5-40(a) to mean actions or transactions "regulated" under laws administered by any regulatory body acting under statutory authority.¹²⁶ Unfair stock trading prac-

121. 702 F.2d at 1219. See FED. R. Civ. P. 8(c). Professor Day of the University of South Carolina School of Law summarized the procedural status of § 39-5-40 when he wrote that "[p]roof of an exemption is clearly an affirmative defense." Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?*, 33 S.C.L. REV. 479, 501 n. 147 (1982).

122. 702 F.2d at 1219.

123. 275 S.C. 104, 267 S.E.2d 539 (1980).

124. 274 S.C. 332, 263 S.E.2d 384 (1980).

125. 702 F.2d at 1219 n.24. Section 39-5-40(a) concerns actions permitted by any regulatory body, and § 39-5-40(d) addresses practices complying with FTC regulations.

126. 275 S.C. at 107, 267 S.E.2d at 541. The court relied on an interpretation by the Rhode Island Supreme Court in *State v. Piedmont Funding Corp.*, 119 R.I. 695, 382 A.2d 819 (1978). The Rhode Island Court interpreted "conduct permitted" to mean "conduct regulated" and held that the sale of securities was exempt from Rhode Island's Deceptive Trade Practices Act. *Id.* at 698-99, 382 A.2d at 822. The South Carolina Supreme

tices were found to be “regulated” under laws administered by the Securities and Exchange Commission and were therefore exempt from the Act.¹²⁷ On the other hand, in *Fritz Waidner Sports Cars*, the court found the Federal Motor Vehicle Information and Cost Savings Act not to be pervasive federal regulation of automobile odometer setting practices; thus, a blanket exemption for these practices was denied.¹²⁸ The court of appeals determined that the interpretation given the UTPA by the South Carolina Supreme Court indicated that the exemption applied only to “fields extensively governed by federal law, where federal preemption might otherwise already apply.”¹²⁹ The court concluded that no exemption arose merely by Michelin’s assertion that its conduct might not be illegal under federal law. Rather, Michelin must prove FTC approval of the type and manner of dealership termination.¹³⁰

In addressing the merits of Bostick’s claim, the court of appeals concluded that the district court erred in holding that the Act covered only those practices which would be unlawful under section 5(a)(1) of the Federal Trade Commission Act.¹³¹ The Fourth Circuit found the district court’s interpretation of the Act to be overly restrictive since section 39-5-20(b) of the Act states that “the courts will be *guided* by the interpretation given” to the Federal Trade Commission Act.¹³² This language, reasoned the court, did not revoke preexisting South Carolina definitions of unfair or deceptive trade practices, nor did it bind the Act to the scope of federal law.¹³³

Court followed suit without indicating whether the exemption applied to all conduct regulated by federal law or whether it applied only to conduct extensively regulated, such as the sale of securities.

127. 275 S.C. at 107, 267 S.E.2d at 541.

128. 274 S.C. at 333, 263 S.E.2d at 385.

129. 702 F.2d at 1220.

130. *Id.*

131. 15 U.S.C. § 5(a)(1)(1976).

132. 702 F.2d at 1220 (emphasis in original).

133. *Id.* In his article, Professor Day discusses the extent of the state law, quoting from *Murphy v. McNamara*, 36 Conn. Supp. 183, 187 n.4, 416 A.2d 170, 174 n.4 (1979)(interpreting identical language in Connecticut’s Unfair Trade Practices Act). “State courts ‘are now free to find methods, acts or practices not heretofore specifically declared unlawful by the FTC or the federal courts prohibited by the [UTPA]. . . .’” Day, *supra* note 121, at 482 (quoted in 702 F.2d at 1220 n.25). Additional support for this proposition is found in § 39-5-160 of the Act: “The powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise

The court of appeals looked at South Carolina law to determine whether the manner by which Michelin terminated Bostick's dealership could be considered an unfair trade practice. The court relied on *deTreville v. Outboard Marine*,¹³⁴ a case decided by the Fourth Circuit twelve years earlier, which held that, "It is well settled law in [South Carolina] that regardless of broad unilateral termination powers, the party who terminated a contract commits an actionable wrong if the manner of termination is contrary to equity and good conscience."¹³⁵ In light of this limit on the power to unilaterally terminate contracts, the court of appeals held that the jury was entitled to decide if Bostick's dealership was terminated to further an anticompetitive or unfair purpose.¹³⁶

The decision in *Bostick* is interesting because it provides an expansive view of the practices that may be found unfair, while imposing an extra burden of proof on the complainant. These two approaches do not seem consistent. The court's brief discussion of the procedural aspects of claiming an exemption under the Act does little to clarify the confusing interpretation given by the South Carolina Supreme Court. In *Rhoades*, the court implied that the applicability of the exemption was an affirmative defense, yet it shifted the burden to the plaintiff to come forward with evidence showing that the particular acts alleged were not exempt.¹³⁷ The court of appeals recognized that the language of section 39-5-40 required Michelin to raise the defense affirmatively, and correctly decided such a defense was un-

provided by law." S.C. CODE ANN. § 39-5-160 (1976).

134. 439 F.2d 1099 (4th Cir. 1971).

135. *Id.* at 1100. The court in *deTreville* found the standard of equity and good conscience to be more stringent than fraud; the standard applies to an unconscionable manner of termination as well as to the infliction of needless injury. *Id.*

136. 702 F.2d at 1220. Of course, if a directed verdict was improper on the legality of Michelin's manner of termination under the Sherman Act, a directed verdict on this same question under the UTPA would also be improper. *Id.* The court of appeals noted that a showing of fraud was not a prerequisite to establishing liability under the UTPA. See *State ex rel. McLeod v. Brown*, 278 S.C. 281, 294 S.E.2d 781 (1982). Also, the UTPA does not require a showing of the existence of a contract, combination, or conspiracy as is required under § 1 of the Sherman Act. Therefore, a jury could find Michelin guilty of a violation of the UTPA without finding a violation of the Sherman Act. The court also concluded that a jury could find Michelin guilty of unfair trade practices without duplicating a verdict on the federal claims. *Id.* The court expressly prohibited an award of duplicative damages for violations of both the state and federal claims. *Id.*

137. 275 S.C. at 107, 267 S.E.2d at 541.

timely when made on a motion for directed verdict.¹³⁸ Yet, by allowing the exemption to be raised by a motion of failure to state a claim, the court has allowed the defendant to avoid the burden of proving an exemption. This places the burden of proof on the plaintiff and may discourage small businesses and consumers from bringing suit under the Unfair Trade Practices Act.

The Fourth Circuit's discussion of section 39-5-40(a) also clarifies some uncertainty created by the South Carolina Supreme Court. Although *Rhoades* interpreted "permitted" to mean "regulated," a literal application of the word "regulated" would severely limit the scope of the UTPA since a substantial amount of business conduct and trade practice is regulated by federal or state law.¹³⁹ Also, a literal application of "regulated" would be inconsistent with the *Fritz Waidner Sports Cars* inquiry into the scope and comprehension of the federal law regulating the conduct in question. Therefore, the Fourth Circuit's interpretation of section 39-5-40(a) as "relat[ing] only to fields extensively governed by federal law, where federal preemption might otherwise already apply"¹⁴⁰ narrows the exemption and gives the UTPA a more general application.¹⁴¹

Other states with statutory exemptions similar to section 39-5-40(a) have interpreted the exemptions to cover conduct "expressly permitted" by federal or state regulatory law.¹⁴² This

138. 702 F.2d at 1219.

139. *Id.* n.24.

140. *Id.* at 1220.

141. This was also the approach taken by the Minnesota Supreme Court in its determination that the Federal Communications Commission was not a pervasive regulatory scheme with primary antitrust jurisdiction. *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 305-306 (Minn. 1980).

142. Connecticut amended its Unfair Trade Practices Act in 1976 from "[conduct] permitted or administered by any regulatory board. . ." to "[conduct] permitted. . ." CONN. GEN. STAT. ANN. § 42-110c(a)(1)(Supp. 1984)(emphasis added). The Connecticut legislature expressed its intent that the Act be remedial and the exemption be read narrowly. Consequently, the exemption is interpreted to mean conduct "specifically permitted." *Olmsted and Langer, The Connecticut Unfair Trade Practices Act*, 52 CONN. B.J. 116, 119 (1978).

Similarly, Washington amended the exemption in its Consumer Protection Act to add "actions or transactions permitted by any other regulatory body." WASH. REV. CODE ANN. § 19.86.170 (1978)(emphasis added). The statute also contains a proviso that conduct specifically permitted by a regulatory board is not a violation of the Act. *Id.* The interpretation of the exemption by the Washington court provides an interesting analysis of the word "permitted." The court in *State v. Readers Digest Ass'n*, 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed*, 411 U.S. 945 (1973), regarded the exemption to

interpretation would exempt only conduct that is expressly permitted under other laws as regulations, creating a conflict if the conduct were actionable under the UTPA. This may be the preferred approach since it is a more narrow reading of the exemption than one based on "pervasive regulation" as "preemption."¹⁴³ There is, however, little indication in *Rhoades* or *Fritz Waidner Sports Cars* that the exemption is to be read so narrowly.

In addition to an expansive reading of the UTPA,¹⁴⁴ the court of appeals also determined that a unilateral termination of a contract may be an unfair trade practice. While South Carolina recognizes the legal right to reserve a unilateral power of termination in a contract, courts may inquire into the motives behind the exercise of that right. The South Carolina cases cited in support of this proposition in *deTreville v. Outboard Marine* clearly represent the minority view.¹⁴⁵ Therefore, the broad interpretation of the scope of the UTPA affords more protection for contracts between a manufacturer and a third party in South Carolina than is afforded in the majority of states.

The significance of the *Bostick* case is its coverage of federal antitrust law under section 1 of the Sherman Act and, especially for South Carolina, its interpretation of the South Carolina UTPA. *Bostick* enunciates a test for a finding of concerted action by recognizing that an inference of such conduct may be

exclude only an activity that requires permission or registration to operate by law and is thus subject to regulation. From this reasoning, the court concluded that the FTC was not a regulatory body within the meaning of the statute. 81 Wash.2d at 279-80, 501 P.2d at 303.

143. Professor Day asserts that "expressly permitted" is the correct interpretation of § 39-5-40(a). Such an interpretation has common meaning and acceptance, [is] consistent with judicially implied repeal, preemption, and exemption, permit[s] meaningful distinctions between the four statutory exemption clauses and promote[s] the legislative purpose of making the Act an effective tool and a remedy of general application against unfair or deceptive acts and practices.

Day, *supra* note 121, at 500. However preferable this interpretation may be, there is little indication in *Bostick* that the court of appeals considered this possibility.

144. See *supra* text accompanying notes 131-33.

145. *Philadelphia Storage Battery Co. v. Mutual Tire Stores*, 161 S.C. 487, 159 S.E. 825 (1931); *Gaines W. Harrison & Sons v. J.I. Case Co.*, 180 F. Supp. 243 (D.S.C. 1960) (holding that the standard of equity and good conscience also applies to a failure to renew a contract). For other cases applying such a standard, see *Morrissey v. Brocmal*, 37 Neb. 295, 56 N.W. 383 (1893); *Maddox Motor Co. v. Ford Motor Co.*, 23 S.W.2d 333 (Tex. Com. App. 1930).

drawn when a manufacturer terminates a price-cutting dealer following competitors' complaints and specific instances of dealer threats against the manufacturer. Also, in finding the NAP to be a per se illegal price maintenance scheme led by Michelin as a regulator of the horizontal competition, *Bostick* raises implications for manufacturers and the degree of control they may have over the policies of their dealers. More significantly, *Bostick* interprets the South Carolina UTPA to cover conduct that before might have been brought under the federal antitrust laws. Since the UTPA does not require proof of a conspiracy, but rather only a showing of unfairness or anticompetitive purposes, the effect will be to allow more plaintiffs to bring antitrust actions without the difficult problem of showing a conspiracy.

Suzanne C. Ebelein

IV. RECOVERY AND STACKING OF UNDERINSURED MOTORIST COVERAGE

The South Carolina Supreme Court interpreted section 56-9-831¹⁴⁶ of the South Carolina Code for the first time in *Gambrell v. Travelers Insurance Companies*.¹⁴⁷ The court addressed two issues in *Gambrell*, the first of which concerned the ability of a motorist to recover under an underinsured motorist provision when the insured's damages exceed the at-fault motorist's liability coverage. Although the at-fault motorist's liability coverage was of a greater amount than the insured victim's underinsured coverage, the court held that section 56-9-831 did allow the insured plaintiff to recover the amount by which her damages exceeded the at-fault motorist's liability coverage, to the

146. S.C. CODE ANN. § 56-9-831 (Supp. 1983) states in part:

Automobile insurance carriers shall offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by § 56-9-830. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured's liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at fault insured or underinsured motorist.

S.C. CODE ANN. § 56-9-831 (Supp. 1983).

147. 280 S.C. 69, 310 S.E.2d 814 (1983).

extent of her underinsured motorist coverage.¹⁴⁸ The second issue concerned the ability of a policyholder, assuming recovery under section 56-9-831 in the first instance, to stack the underinsured motorist coverage on her two vehicles. The court followed its rationale in *Kraft v. Hartford Insurance Co.*¹⁴⁹ and held that the plaintiff could stack underinsured motorist coverage because section 56-9-831¹⁵⁰ specifically prohibits stacking in only two situations, neither of which was applicable to Gambrell's case.¹⁵¹

Linda Gambrell, the plaintiff, was seriously injured in a head-on collision caused by the negligence of William Suttles (the at-fault motorist). Suttles carried \$50,000 of liability coverage which his insurer paid to Gambrell;¹⁵² however, the plaintiff's damages exceeded this amount. Gambrell had purchased \$15,000 in underinsured motorist coverage for each of her two vehicles, and brought a declaratory judgment action¹⁵³ to apply this underinsured coverage to the deficiency in the settlement with Suttles.

Gambrell defined an "underinsured" motorist as one who lacks sufficient liability coverage to pay the total amount of

148. *Id.* at 70, 310 S.E.2d at 815.

149. 279 S.C. 257, 305 S.E.2d 243 (1983). The court in *Kraft* held that automobile liability insurance could be stacked when an insured is driving a vehicle that he does not own. For a survey of the *Kraft* opinion, see *infra* at pp. 30-39.

150. S.C. CODE ANN. § 56-9-831 (Supp. 1983) provides in part:

If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured . . . is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's . . . vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess of underinsured coverage. Coverage on any other vehicles shall not be added to that coverage.

S.C. CODE ANN. § 56-9-831 (Supp. 1983).

151. 280 S.C. at 73, 310 S.E.2d at 817.

152. Brief of Appellant at 2. Suttles' insurer paid Gambrell under a covenant not to execute. *Id.*

153. *Id.* at iii. The case was heard in federal court under diversity jurisdiction. Pursuant to S.C. SUP. CT. R. 46, *Gambrell* was certified to the South Carolina Supreme Court by the Fourth Circuit Court of Appeals. 280 S.C. at 70, 310 S.E.2d at 815. The supreme court chose to answer the questions certified since they required interpretation of a state statute for which there was no controlling precedent. These questions would be determinative of the cause pending before the Fourth Circuit and therefore, through certification, a state court decision on the issue would carry "the same force and effect as any other decision of the Supreme Court," S.C. SUP. CT. R. 46, which a Fourth Circuit decision would not do.

damages sustained. The insurer argued that in the absence of a statutory definition, it was justified in defining "underinsured" according to the policy term¹⁵⁴ as "[a] motor vehicle with respect to the ownership maintenance or use of which the sum of the limit of liability under all bodily injury or property damage liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits under this insurance. . . ."¹⁵⁵ Essentially, the insurance company asserted that this meant that a motor vehicle is underinsured if the sum of the limits of liability under all applicable insurance policies of the at-fault motorist is less than the applicable limits under the insured's policy. The insurer further contended that one of the primary purposes of underinsured motorist coverage is to protect against out-of-state vehicles which do not carry the statutory minimum coverage.¹⁵⁶ To determine which of these interpretations of "underinsured" was intended by the legislature, the court studied the language and purpose of section 56-9-831 and the differences between uninsured motorist coverage and underinsured motorist coverage.¹⁵⁷

The court recognized that it should apply general rules of contract construction to an insurance contract and that it should give the policy language its plain meaning.¹⁵⁸ However, when the plain meaning seems to contradict a statute, the statute will prevail.¹⁵⁹ Considering the ordinary and popular significance of the language, the court concluded that section 56-9-831 provides

154. Brief of Appellee at 6. Travelers also cited *Willis v. Fidelity & Casualty Co. of N.Y.*, 253 S.C. 91, 169 S.E.2d 282 (1969) for the proposition that a voluntary contract for insurance coverage which is not statutorily mandated allows the parties to choose their terms.

155. 280 S.C. at 72 n.1, 310 S.E.2d at 816 n.1.

156. *Id.* at 72, 310 S.E.2d at 816.

157. The court stated the general rule for construction of a statute that "the legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in the light of the intended purpose of the [s]tatutes." *Id.* at 71, 310 S.E.2d at 816 (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 394-95, 134 S.E.2d 206, 209 (1964)). The court in *Laird* interpreted part of the Uninsured Motorist Act to determine the scope of liability of the defendant insurance company.

158. 280 S.C. at 71, 310 S.E.2d at 816. The court cited *Sloan Constr. Co. v. Central Nat'l Ins. Co.*, 269 S.C. 183, 236 S.E.2d 818 (1977) which held that insurance policies are subject to the general rules of contract construction in a determination of whether the plaintiff had a right to recover against defendant under his insurance policy. 267 S.C. at 185, 236 S.E.2d at 819.

159. *See* 280 S.C. at 71, 310 S.E.2d at 816-17.

coverage when the injured party's damages exceed the liability limits of the at-fault motorist.¹⁶⁰ The statute contains the restriction that an *insured* may not carry a greater amount of underinsured motorist coverage than he does liability coverage. There is no requirement that the insured's underinsured coverage limits exceed the liability limits of the at-fault motorist.

Furthermore, since the statutory minimum for liability insurance in South Carolina is \$15,000¹⁶¹ and, under section 56-9-831, underinsured motorist coverage cannot exceed the limits of the insured's liability coverage, underinsured motorist coverage, accepting defendant's definition, would be rendered valueless in some situations.¹⁶² According to the insurance company's definition, if the at-fault motorist had the statutory minimum liability coverage of \$15,000 and the insured had underinsured coverage of \$15,000, there would be no recovery even if the insured's damages were greater than \$15,000. Therefore, uninsured coverage would be worthless to an insured with minimum liability coverage.

160. *Id.* at 70, 310 S.E.2d at 816. The insurance company also contended that the provisions of its policy conformed to the definition of an "underinsured" motorist found in a South Carolina administrative interpretation which read, "[B]y definition, an underinsured vehicle is one which is insured but for a limit less than the underinsured limit purchased by the Insured." S.C. Department of Insurance Interpretive Bulletin No. 78-6, 1948 S.C. Acts 569. The Insurance Commission compared liability limits of the at-fault motorist to underinsured limits of the insured motorist. The court found that this interpretation did not comport with the meaning of the statute stating, "This 'administrative construction . . . affords no basis for the perpetration of a patently erroneous application of the statute.'" 280 S.C. at 72, 310 S.E.2d at 817 (quoting *Monroe v. Livingston*, 251 S.C. 214, 217, 161 S.E.2d 243, 244 (1968)).

161. S.C. CODE ANN. § 56-9-820 (1976) sets the minimums at \$15,000 for bodily injury to or the death of one person in any one accident, \$30,000 for bodily injury to or death of two or more persons in any one accident, and \$5000 for injury to or destruction of property of others in any one accident.

162. 280 S.C. at 72, 310 S.E.2d at 817. This issue surfaced one year later in *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984). The insurance company in *Garris* contended that underinsured motorist coverage applied only when the insured's underinsured limits were greater than the at-fault motorist's liability coverage, because recovery under the insured's underinsured coverage is offset by the amount of recovery from the at-fault motorist. Although Travelers raised this same argument in *Gambrell*, see Brief of Appellee at 7, the supreme court never addressed the issue. The court in *Garris*, however, made it clear that underinsured coverage was not meant to fill the gap between the at-fault motorist's liability limits and the insured's underinsured limits. 280 S.C. at 154, 311 S.E.2d at 726. Since an offset is not allowed, the court concluded that underinsured coverage in an amount less than or equal to the statutory minimum of \$15,000 would not be valueless. *Id.* at 154, 311 S.E.2d at 726.

The court also rejected defendant's argument that underinsured coverage provided protection against out-of-state drivers who do not satisfy the statutory minimum, noting that if this were the case, there would be no need for *uninsured* motorist insurance coverage, required by law in South Carolina.¹⁶³ The purpose of requiring uninsured motorist coverage is to protect an insured in case an at-fault driver has *no* liability coverage or has *less* liability coverage than is statutorily required.¹⁶⁴ The defendant's definition of underinsured coverage would negate this purpose since it is identical to the purpose of uninsured coverage. The legislature's differentiating between the two types of coverage would be rendered senseless.

The South Carolina Code not only provides for underinsured motorist coverage, but also provides for additional, optional, uninsured motorist coverage up to the limits of the insured's liability coverage.¹⁶⁵ Accepting the defendant's argument would likewise negate this provision. It is doubtful that the legislature would have provided in the same statute for both optional uninsured and underinsured motorist coverage if they were intended to accomplish the same purpose. It seems logical that uninsured coverage covers damages not otherwise covered because the at-fault motorist's liability coverage is *less* than the amount statutorily required, and that underinsured coverage covers damages not otherwise covered because the at-fault motorist's liability coverage, although *equal* to or *greater than* the amount statutorily required, is less than the damages the injured party sustains. It also covers any damages beyond that covered by the insured's uninsured coverage.¹⁶⁶

In *Holman v. All Nation Insurance Co.*,¹⁶⁷ the Minnesota Supreme Court discussed whether *Lick v. Dairyland Insurance*

163. S.C. CODE ANN. § 56-9-830 (1976) states:

No such policy . . . shall be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 56-9-820, as amended from time to time.

S.C. CODE ANN. § 56-9-830 (1976).

164. 280 S.C. at 72, 310 S.E.2d at 816.

165. See *supra* note 146.

166. 280 S.C. at 72, 310 S.E.2d at 816.

167. 288 N.W.2d 244 (Minn. 1980).

Co.¹⁶⁸ operated to limit underinsured motorist coverage to the amount by which the coverage exceeded the liability coverage of the at-fault motorist. The court in *Lick* held that by purchasing underinsured coverage an individual could ensure that, should he be injured by one who carried liability insurance in an amount less than the minimum required by statute, he would have available to him the full amount required by the liability statute.¹⁶⁹ In a footnote, the court noted that this interpretation would make underinsured coverage valueless in certain circumstances. However, in Minnesota underinsured coverage could arguably apply to protect against out-of-state motorists who did not meet Minnesota's statutory requirements,¹⁷⁰ because Minnesota, unlike South Carolina, did not include having less insurance than the statutory minimum within the statutory definition of "uninsured."¹⁷¹

By 1975, the Minnesota No Fault Act was in effect. This Act required all motorists in Minnesota, including those from out-of-state, to be protected by an insurance plan meeting minimum requirements. A driver who did not carry such insurance was "uninsured."¹⁷² In effect, the No Fault Act definition of uninsured motorist, combined with the *Lick* rule, nullified underinsured coverage when a driver, who carried underinsured motorist coverage in an amount equal to the minimum liability coverage required, was hit by another driver carrying the statutory minimum or less. It was pointless even to offer underinsured motorist coverage in an amount equal to minimum liability coverage.¹⁷³

In response to this dilemma, the Minnesota legislature amended the statute upon which the court in *Lick* had relied. The amendment specified that his underinsured coverage entitled an insured to recover uncompensated damages which occurred when total damages exceeded the tortfeasor's liability limits.¹⁷⁴ Thus, for accidents occurring after the No Fault Act

168. 258 N.W.2d 791 (Minn. 1977).

169. *Id.* at 793-94. This is referred to as the *Lick* rule in *Holman*, 288 N.W.2d at 250.

170. 258 N.W.2d at 794 n.3.

171. *Id.* at 794.

172. 288 N.W.2d at 250.

173. *Id.*

174. *Id.* at 250-51.

became effective, the *Lick* rule was inapplicable. The plaintiff in *Holman* was allowed to recover underinsured motorist benefits in addition to bodily injury liability benefits to the extent of his damages.¹⁷⁵

The situation in South Carolina may be analogized to that in *Holman* even though the equivalent South Carolina statutes are not within a No Fault Act, but are instead within the Motor Vehicle Financial Responsibility Act.¹⁷⁶ South Carolina's legislature has specifically mandated uninsured motorist coverage in an amount at least equal to the statutory liability limits¹⁷⁷ and has also required insurers to offer underinsured motorist coverage, and the statutes should be interpreted with an assumption that the drafters did not intend for these provisions to be purely redundant. If uninsured coverage gives the insured the same protection whether injured by an uninsured motorist or by a tortfeasor with a standard liability policy,¹⁷⁸ the only gap left for underinsured coverage to fill is that between the liability limits of the tortfeasor's policy and the injured party's damages.

As to the second issue in *Gambrell*, whether the plaintiff-insured could stack the coverage she held on two automobiles, the court noted that section 56-9-831 prohibits stacking in only two situations, neither of which is applicable in *Gambrell*.¹⁷⁹ The first situation occurs when an insured carries underinsured motorist coverage in excess of the basic limits. The court interpreted this to mean that an insured may stack any underinsured motorist coverage up to, but not in excess of, the basic liability limits on each automobile.¹⁸⁰ The second situation occurs when none of the insured's vehicles is involved in the accident. In this case, coverage is available only to the extent of coverage on any one of the vehicles with the underinsured coverage.¹⁸¹ "Coverage on any other vehicles shall not be added to that coverage."¹⁸² The court found this last sentence inapplicable when, as in

175. *Id.* at 251.

176. S.C. CODE ANN. §§ 56-9-10 to -910 (1976 & Supp. 1983).

177. *See supra* note 160.

178. 7 AM. JUR.2D *Automobile Insurance* § 293 (1980). *See also* 243 S.C. at 392, 134 S.E.2d at 208, for an explanation of the purpose of uninsured motorist insurance.

179. *See supra* text accompanying notes 149-51.

180. 280 S.C. at 73, 310 S.E.2d at 817.

181. *Id.*

182. *Id.* (quoting S.C. CODE ANN. § 56-9-831 (Supp. 1983)(emphasis omitted)).

Gambrell, one of the insured's automobiles is involved in the accident at issue.

In *Esler v. United Services Automobile Association*,¹⁸³ the South Carolina Supreme Court stated, "The crucial test to be applied in [determining whether stacking is permissible] is not the number of policies issued but rather the number of additional coverages which were separately contracted and paid for."¹⁸⁴ Here, *Gambrell* purchased underinsured coverage for her two automobiles through one policy, but she paid a separate premium to obtain underinsured coverage on each automobile. Thus, the court held she passed the test which entitled her to stack her underinsured motorist coverage for the two vehicles.¹⁸⁵

The South Carolina Supreme Court in *Gambrell* clearly delineated the differences between uninsured motorist coverage and underinsured motorist coverage. Each serves a distinct purpose; otherwise, both would not have been included within the statute. When insurance companies provide underinsured motorist coverage in the future, they should be aware that under South Carolina Code section 56-9-831, they will be liable for any damages in excess of the tortfeasor's liability coverage. The only limitation is that underinsured coverage cannot exceed the insured's own liability coverage. Also, plaintiffs may now stack this underinsured coverage, or, in other words, may add together the coverages they have procured with each of the premiums. This mechanism will help plaintiffs collect all of the damages they are awarded.

Suzanne C. Ebelein

V. STACKING OF NON-OWNED AUTOMOBILE LIABILITY INSURANCE

On an issue of first impression,¹⁸⁶ the South Carolina Su-

183. 273 S.C. 259, 255 S.E.2d 676 (1979).

184. *Id.* at 263, 255 S.E.2d at 679.

185. 280 S.C. at 74, 310 S.E.2d at 817. The court referred to *Kraft*, surveyed *infra* at pp. 30-39, its recent stacking decision, as support for the *Esler* test. 280 S.C. at 74, 310 S.E.2d at 817. *Gambrell*, however, presents a stronger case for stacking than did *Kraft* since there was no evidence in *Kraft* that additional premiums were paid for coverage of additional non-owned vehicles. 279 S.C. at 259, 305 S.E.2d at 244-45.

186. Brief of Appellant at 6, *Kraft v. Hartford Ins. Co.*, 279 S.C. 257, 305 S.E.2d 243 (1983).

preme Court held in *Kraft v. Hartford Insurance Co.*¹⁸⁷ that automobile liability insurance may be "stacked"¹⁸⁸ when an insured is driving a vehicle that he does not own.¹⁸⁹ Previous decisions have discussed stacking in the contexts of medical insurance coverage and uninsured motorist coverage,¹⁹⁰ but *Kraft* is the first to allow stacking of non-owned¹⁹¹ vehicle coverage. The decision seems to conflict with similar decisions in other jurisdictions¹⁹² and with a Fourth Circuit opinion on the same subject.¹⁹³ The court based its decision on policy reasons it thought were strong enough to allow, in effect, double coverage for the plaintiff.

While riding his motorcycle, George Kraft, the plaintiff-respondent, was struck by a vehicle driven by Thomas Geathers and owned by his brother, Richard Geathers. The driver was insured under an automobile liability insurance policy issued by Hartford Insurance Company (Hartford), the appellant. The driver's insurance policy covered two vehicles, each carrying the minimum coverage of \$15,000 for bodily injury to or death of one person.¹⁹⁴ The premiums for each vehicle's liability coverage

187. 279 S.C. 257, 305 S.E.2d 243 (1983).

188. "Stacking" has been defined as a determination of the amount of insurance coverage by "multiplying the face limits of a policy by the number of vehicles insured thereunder to arrive at a higher limit of recovery." *Nationwide Mut. Ins. Co. v. Bair*, 257 S.C. 551, 554 n.1, 186 S.E.2d 410, 411 n.1 (1972). Stacking may also refer to recovery allowed under two separate insurance policies. See *Esler v. United Services Auto. Ass'n*, 273 S.C. 259, 263, 255 S.E.2d 676, 679 (1979).

189. 279 S.C. at 258, 305 S.E.2d at 244.

190. See *Esler v. United Services Auto. Ass'n*, 273 S.C. 259, 255 S.E.2d 676 (1979)(stacking of additional personal injury protection benefits under a multiple vehicle policy allowed); *Boyd v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 316, 195 S.E.2d 706 (1973)(stacking of uninsured motorist coverage required when two separate policies are concerned); *Nationwide Mut. Ins. Co. v. Bair*, 257 S.C. 551, 186 S.E.2d 410 (1972)(stacking of uninsured motorist limits and medical benefits under a multiple vehicle policy not required).

191. Non-owned vehicle liability coverage insures a policy holder for any liability he may incur while driving a vehicle that he does not own.

192. See *Allstate Ins. Co. v. Mole*, 414 F.2d 204 (5th Cir. 1969)(under Florida law, stacking of non-owned vehicle coverage not allowed); *Otto v. Allstate Ins. Co.*, 2 Ill. App.3d 58, 275 N.E.2d 766 (Ill. App. Ct. 1971)(one insurance policy containing two separate certificates of insurance not interpreted as two separate policies allowing double recovery); *Am. Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. 1972)(stacking of non-owned automobile protection not allowed when there is no additional payment for each automobile covered under the policy).

193. See *Emick v. Dairyland Ins. Co.*, 519 F.2d 1317 (4th Cir. 1975).

194. These minimum levels of coverage are set out in the Code as "Bodily injury

were separately itemized in the insurance policy.¹⁹⁵

Kraft sought \$30,000 from Hartford, aggregating the minimum coverages of both insured vehicles. Hartford refused to pay more than \$15,000, the amount of coverage for one automobile. Kraft then brought this declaratory judgment action¹⁹⁶ to resolve the question of whether the minimum coverages on two insured automobiles may be added, or "stacked," when the insured was driving a vehicle which he did not own.¹⁹⁷

The trial court granted Kraft's motion for summary judgment on the grounds that section 56-9-820 of the South Carolina Code¹⁹⁸ applies to liability coverage for the operation of non-owned vehicles, and that this coverage is afforded separately to each vehicle insured. Consequently, limitations on stacking liability coverage are in derogation of the statute and cannot be allowed.¹⁹⁹ Hartford appealed this decision.

Both parties conceded that an insured who contracts and pays for double coverage should receive it.²⁰⁰ Hartford claimed that Geathers contracted and paid for only single coverage for his non-owned automobile liability protection and therefore was not entitled to receive coverage for both automobiles listed in the policy.²⁰¹ Hartford introduced an affidavit of one of its per-

and property damage limits; general requirements."

No policy . . . of bodily injury liability insurance or of property damage liability insurance, covering liability arising from the ownership, maintenance, or use of any motor vehicle, shall be issued . . . unless it contains a provision insuring the persons defined as insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicles . . . subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows: fifteen thousand dollars because of bodily injury to or death of one person in any one accident, and . . . thirty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and five thousand dollars because of injury to or destruction of property of others in any one accident.

S.C. CODE ANN. § 56-9-820 (1976).

195. Record at 41.

196. This action was brought pursuant to the Uniform Declaratory Judgments Act, S.C. CODE ANN. §§ 15-53-10 to -140 (1976).

197. 279 S.C. at 258, 305 S.E.2d at 244.

198. For text of S.C. CODE ANN. § 56-9-820, see *supra* note 194.

199. Record at 46-47. It is interesting to note that the South Carolina Supreme Court did not discuss the grounds upon which the trial court decision rested; however, the court reached the same result by different reasoning.

200. 279 S.C. at 258, 305 S.E.2d at 244.

201. *Id.*

sonal lines managers²⁰² that the policy provided the insured with coverage while driving a non-owned vehicle regardless of how many vehicles were named in the policy; the insured would pay no additional premium for non-owned vehicle coverage, even though more vehicles were added to the policy.

The supreme court found that an insurer is not required by the Motor Vehicle Financial Responsibility Act²⁰³ to offer non-owned vehicle coverage, and therefore, the parties may contract as they see fit.²⁰⁴ The court then analyzed the relevant portions of Geathers' policy to determine whether it provided non-owned vehicle coverage on each automobile covered by the policy. Section I of the policy, the "Liability" portion, provided that "the insurer agrees to pay . . . all sums the insured is legally obligated to pay as damages which arise out of the ownership, maintenance, or use of the owned automobile or any non-owned automobile."²⁰⁵ The "conditions" portion of the policy stated:

Two or more automobiles—Section I, II and IV: When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each²⁰⁶

This is commonly known as a "separability clause."²⁰⁷

The court construed the separability clause to treat each vehicle as if it were insured on a separate policy with respect to the liability, medical payments, and physical damages sections (Sections I, II and IV). The court reasoned that stacking would not be denied if the vehicles were listed on separate policies,

202. For the complete affidavit, see Record at 21.

203. S.C. CODE ANN. §§ 56-9-10 to -910 (1976 & Supp. 1983).

204. 279 S.C. at 258, 305 S.E.2d at 244. The court cited *Willis v. Fidelity and Casualty Co.*, 253 S.C. 91, 169 S.E.2d 282 (1969), in support of this proposition. The *Willis* decision also discussed non-owned automobile liability coverage, although in a different context than *Kraft*. In *Willis* the automobile involved in the accident was owned by a member of insured's household, but was excluded from insured's non-owned automobile liability coverage. The court held that the Motor Vehicle Safety Responsibility Act (now the Motor Vehicle Financial Responsibility Act) required coverage for an insured only while operating an insured vehicle; the provision of an automobile liability policy excluding coverage of an insured while driving an automobile not listed in the policy but owned by the named insured or a member of the same household did not conflict with the Act and was a valid voluntary contract. 253 S.C. at 96-97, 169 S.E.2d at 284-85.

205. 279 S.C. at 259, 305 S.E.2d at 244.

206. *Id.*

207. *Id.* See also *Emick v. Dairyland Ins. Co.*, 519 F.2d 1317, 1320 (4th Cir. 1975). The entire insurance policy at issue in *Kraft* is set out in the Record at 5-18.

even if with different insurance companies, and both policies carried non-owned vehicle coverage. Therefore, it would be an artificial construction to refuse stacking merely because two or more cars were listed on one policy.²⁰⁸ Interpreting the policy liberally in favor of the insured, the court commented that if the insurer did not intend for the non-owned coverage to apply separately to each automobile, it could have included a clause similar to the language in the affidavit.²⁰⁹

The opinion summarily disposed of Hartford's argument that Geathers paid no additional premiums for coverage of non-owned automobiles when additional cars were added to the policy. The court found this to be of "little significance"²¹⁰ since neither the insurance policy nor the affidavit indicated that the insured paid *any* premium for non-owned vehicle coverage. Instead, the court reasoned that non-owned vehicle coverage could have been offered gratuitously or as a built-in component of liability coverage already included in the premium.²¹¹

The South Carolina Supreme Court has discussed the stacking issue in contexts other than non-owned vehicle liability coverage. *Nationwide Mutual Insurance Co. v. Bair*²¹² held that section 46-750.33 of the 1962 South Carolina Code²¹³ did not require the stacking of uninsured motorist endorsement limits when two vehicles were insured under one policy.²¹⁴ The court determined that the phrase "with respect to each motor vehicle" in section 46-750.32²¹⁵ did not require that the minimum limits

208. 279 S.C. at 259-60, 305 S.E.2d at 245. See also Brief of Respondent at 6.

209. 279 S.C. at 259, 305 S.E.2d at 244-45.

210. *Id.*, 305 S.E.2d at 245.

211. *Id.*

212. 257 S.C. 551, 186 S.E.2d 410 (1972).

213. The equivalent section in the 1976 Code reads in part:

No such policy or contract shall be issued or delivered unless it contains a provision . . . herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner as operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 56-9-820. . . .

S.C. CODE ANN. § 56-9-830 (1976).

214. 257 S.C. at 555, 186 S.E.2d at 412. The court also held that "under the policy's plain and unambiguous provisions," *id.* at 557, 186 S.E.2d at 413, stacking of medical payments was not required. *Id.* at 556-57, 186 S.E.2d at 412-13. The court distinguished *Bair* from decisions in other jurisdictions that have allowed stacking of medical payments when the policy provisions were ambiguous. *Id.* at 557, 186 S.E.2d at 413.

215. For text of the equivalent section in the 1976 Code, see *supra* note 194.

for liability coverage apply separately to vehicles covered under one policy. Rather, it defined the scope of the policy, assuring that the minimum limits apply to any one of the vehicles covered.²¹⁶ Since the uninsured motorist section required the same minimum as section 46-750.32, the court concluded that its interpretation of section 46-750.32 applied also to section 46-750.33.²¹⁷

On the other hand, *Boyd v. State Farm Mutual Automobile Insurance Co.*²¹⁸ allowed double recovery of uninsured motorist benefits under two separate liability insurance policies.²¹⁹ The court invalidated an "other insurance" clause in the policies which purported to limit the insurer's liability to \$8,000 per policy. The clause, stated the court, was inconsistent with the \$10,000 minimum coverage mandated by section 46-750.32.²²⁰ The court concluded that "the obligation of the insurer under the terms of the statute is to pay plaintiff *all sums* which he is legally entitled to recover from the tortfeasor up to the limit of insurance provided by both policies."²²¹

The most recent pre-*Kraft* decision in South Carolina is *Esler v. United Services Automobile Association*.²²² Similarly to *Kraft*, the insured in *Esler* had one automobile policy that covered two automobiles and provided additional personal injury protection (APIP) in the amount of \$2,500 per car. The court held that stacking of APIP benefits was permitted under the authority of *Belk v. Nationwide Mutual Insurance Co.*,²²³ which allowed an insured to recover APIP benefits from two policies when two premiums were paid.²²⁴ The court in *Esler* did not make a distinction between the case in which two cars are covered under one policy and the situation in which two cars are covered under separate policies, stating, "The crucial test to be

216. 257 S.C. at 554, 186 S.E.2d at 411. The trial court in *Kraft* held that the statute applies separately to each vehicle insured. Since the supreme court held that the statute did not mandate non-owned vehicle coverage, it never reached this issue.

217. 257 S.C. at 554, 186 S.E.2d at 411.

218. 260 S.C. 316, 195 S.E.2d 706 (1973).

219. *Id.* at 321, 195 S.E.2d at 708.

220. *Id.* at 319-20, 195 S.E.2d at 707. The equivalent section of the 1976 Code is § 56-9-820. This statute now requires minimum coverage of \$15,000. *See supra* note 194.

221. 260 S.C. at 321, 195 S.E.2d at 708 (emphasis in original).

222. 273 S.C. 259, 255 S.E.2d 676 (1979).

223. 271 S.C. 24, 244 S.E.2d 744 (1978).

224. 273 S.C. at 263, 255 S.E.2d at 679.

applied in situations such as the present one is not the number of policies *issued* but rather the number of additional coverages which were separately contracted and paid for."²²⁵ *Esler* therefore indicates that the controlling principle in the stacking cases is to allow the insured the "benefit of his bargain"²²⁶ when multiple premiums have been paid for multiple coverage.

In *Kraft*, the plaintiff and the trial court relied upon *Boyd* and *Esler* to permit stacking.²²⁷ The defendant tried to distinguish *Boyd* and *Esler* on the basis that the insured parties in those cases paid double premiums for the type of coverage in dispute and were therefore entitled to the coverage for which they paid.²²⁸ Defendant also argued that the decision in *Boyd* was consistent with the majority rule which allowed stacking of uninsured motorist insurance *only* when a double premium has been paid.²²⁹ The court in *Kraft* negated these arguments by stating that lack of payment of double premiums was insignificant. The fact that the insurer drafted the policy with a separability clause and failed to clarify the ambiguity surrounding premium payments for non-owned vehicle coverage was determinative.

In analyzing the *Kraft* decision, reliance on *Boyd* and *Esler* may be misguided. Uninsured motorist coverage and medical payments have been distinguished from non-owned vehicle coverage by a number of courts which have held to the contrary of *Kraft* on the issue of stacking non-owned vehicle coverage.²³⁰ The Fourth Circuit case *Emick v. Dairyland Insurance Co.*²³¹ clearly demonstrates that the underlying principles allowing stacking of uninsured motorist coverage and medical payments cannot be the basis for stacking non-owned vehicle coverage. *Emick*, like *Kraft*, concerned the stacking of non-owned vehicle liability coverage when a policy contained both a "Liability"

225. *Id.*, 255 S.E.2d at 679 (emphasis added).

226. *Id.*, 255 S.E.2d at 679.

227. Brief of Appellant at 12.

228. *Id.*

229. *Id.*

230. See *Allstate Ins. Co. v. Mole*, 414 F.2d 204 (5th Cir. 1969); *Government Employees Ins. Co. v. Sweet*, 186 So.2d 95 (Fla. Dist. Ct. App. 1966); *Allstate Ins. Co. v. Bellars*, 462 S.W.2d 550 (Tex. 1970); *Rosar v. Gen. Ins. Co. of Am.*, 41 Wis.2d 95, 163 N.W.2d 129 (1968).

231. 519 F.2d 1317 (4th Cir. 1975).

clause and a "Separability" clause. It is interesting to note that the court in *Emick* used arguments almost identical to those later used by the South Carolina Supreme Court in *Kraft* to reach the opposite result.²³² Recognizing that the combination of a liability clause and a separability clause may create ambiguity, the court in *Emick* focused on the fact that separate premiums are generally assessed for medical payment and uninsured motorist coverage.²³³ Since there was no proof in *Emick* that the insured paid a specific premium for non-owned vehicle liability coverage for each car, there was no justification for resolving the ambiguity in favor of stacking the coverage.²³⁴ Without proof of such payments, the Fourth Circuit refused to presume that a double premium was charged and paid. It further reasoned that the nature of non-owned automobile liability coverage precluded such a presumption, stating, "[T]here is no rational nexus between this coverage and the number of owned vehicles listed in the policy. . . ."²³⁵

The court further reasoned that even if separate policies had been written for each vehicle, the insured still could not have recovered the amounts for each car.²³⁶ In distinguishing medical payments and uninsured motorist coverage from non-owned vehicle liability coverage, the court characterized the former types of coverage as broad "first party" coverages "closely

232. The plaintiff in *Kraft* argued that the district court opinion in *Emick*, 389 F. Supp. 1025 (W.D. Va. 1974), overturned by the Fourth Circuit, is "more consonant with the South Carolina Rule as propounded in *Esler*." Brief for Respondent at 4, *Kraft*. The district court in *Emick* held that when an insurance company charges a separate and equal amount for non-owned vehicle liability coverage for each vehicle listed in the policy, the combination of a liability clause and a separability clause creates an ambiguity that must be strictly construed against the insurance company, thereby requiring that the otherwise separate limits of bodily injury liability on each vehicle be stacked. 519 F.2d at 1320.

The district court listed two criteria in determining whether stacking should be applied: (1) the presence of a liability and a separability clause; and (2) the payment of a separate premium. 389 F. Supp. at 1031. The circuit court found neither of these to be present on the facts of *Emick*. See *infra* notes 233-40 and accompanying text.

233. 519 F.2d at 1323.

234. *Id.* at 1324. The circuit court noted that the policy did not indicate whether any portion of the premiums was attributable to non-owned vehicle liability coverage and there was no evidence that insured paid twice for this coverage. *Id.* Furthermore, the court noted, as did the supreme court in *Kraft*, that this coverage could have been offered gratuitously to promote insurer's policies. *Id.*

235. *Id.*

236. *Id.* at 1325.

akin to personal accident policies.”²³⁷ Medical and uninsured motorist insurance coverages focus on the *person* of the insured, regardless of the number of cars he owns and regardless of liability on his part. It has a “floating” character and

has led courts to ignore the fact that these coverages have been engrafted onto liability policies insuring particular cars, and to hold that where double premiums have been paid, whether under a single policy covering more than one automobile, or whether under separate and independent policies, double coverage has been purchased and stacking will be allowed. . . .²³⁸

On the other hand, non-owned vehicle liability coverage merely insures the policy holder against any liability the insured may incur while driving a non-owned vehicle. Bodily injury liability coverage and its attendant limits attach to whichever automobile the insured happens to be driving, and such coverage may not be stacked.²³⁹ Therefore, a separability clause does not create an ambiguity with regard to bodily injury liability coverage. It merely assures that the policy applies to each car covered under the policy.²⁴⁰

The Fourth Circuit and other courts have considered the payment of additional premiums for additional coverage to be a crucial factor in allowing stacking.²⁴¹ Also significant are the inherent differences between medical or uninsured motorist coverages and non-owned vehicle liability coverage.²⁴² Apparently the court in *Kraft* did not allow either of these factors to affect its decision. The court construed the policy strictly against the insurer on the grounds that the separability clause made the policy ambiguous.

By failing to take into account the issue of additional premium payments for the coverage in question, *Kraft* deviates from *Esler* and the majority rule.²⁴³ In addition, the majority of

237. *Id.*

238. *Id.* at 1325-26.

239. *Id.* at 1326.

240. *Id.* See also *Pacific Indem. Co. v. Thompson*, 56 Wash.2d 715, 355 P.2d 12 (1960).

241. See *supra* notes 192-93 and accompanying text.

242. See *supra* note 230.

243. Although the majority rule allows stacking when the insured purchases double premiums, many courts have found it difficult to allocate the amount of the premium paid for each vehicle in a multiple vehicle policy to the types of coverage provided. See

courts have rejected the contention made in *Kraft* that a separability clause creates an ambiguity with regard to bodily injury liability coverage.²⁴⁴ Although separability clauses have been construed to create two separate policies in the context of uninsured motorist coverage and medical payments,²⁴⁵ no court prior to *Kraft* has held that the clause creates two separate policies of non-owned vehicle liability insurance.²⁴⁶

Furthermore, the *Bair* decision indicates that South Carolina aligns itself with the majority rule regarding stacking of liability limits. The court's construction in *Bair* of the language of section 56-9-820 of the South Carolina Code does not require the statutory liability limits to apply to each vehicle listed in a policy. This statutory language is analogous to the separability clause found in *Kraft*. *Bair* may have alluded to the distinction between liability coverage and uninsured motorist coverage or medical payments when the court stated, "The defendants have not suggested that cumulation, or 'stacking,' of policy limits is required by statute where *liability* coverage is concerned."²⁴⁷

In summary, insureds in South Carolina may now stack their insurance coverage when a non-owned vehicle coverage clause is present in the policy. The insured does not have to pay an additional premium to obtain this result, but merely needs to insure additional vehicles under the policy. Insurers may, however, avoid this result by expressly providing that a separability clause does not affect insurer's liability limits.

Suzanne C. Ebelein

Bogart v. Twin City Fire Ins. Co., 473 F.2d 619 (5th Cir. 1973); Otto v. Allstate Ins. Co., 2 Ill. App.3d 58, 275 N.E.2d 766 (Ill. App. Ct. 1971); Am. Liberty Ins. Co. v. Ranzau, 481 S.W.2d 793 (Tex. 1972). These courts have expressly rejected the presumption that premium payments for additional vehicles include an additional payment for each type of coverage. This may be the underlying distinction between *Bair* and *Boyd*. See *supra* notes 212-21 and accompanying text.

244. See *Emick v. Dairyland Ins. Co.*, 519 F.2d 1317 (4th Cir. 1975); *Allstate Ins. Co. v. Mole*, 414 F.2d 204 (5th Cir. 1969); *Rosar v. Gen. Ins. Co. of Am.*, 41 Wis.2d 95, 163 N.W.2d 129 (1968). These courts have noted a distinction between medical payments or uninsured coverage and non-owned coverage. See also *supra* notes 237-40 and accompanying text.

245. See *Gov't Employees Ins. Co. v. Sweet*, 186 So.2d 95 (Fla. Dist. Ct. App. 1966); *Southwestern Fire & Casualty Co. v. Atkins*, 346 S.W.2d 892 (Tex. Civ. App. 1961); *Cent. Sur. & Ins. Corp. v. Elder*, 204 Va. 192, 129 S.E.2d 651 (1963).

246. *Emick v. Dairyland Ins. Co.*, 519 F.2d 1317, 1327 (4th Cir. 1975).

247. 257 S.C. at 554, 186 S.E.2d at 411.

VI. NON-PAYMENT OF MERIT RATING SURCHARGE PREMIUMS
BILLED AFTER RENEWAL PREMIUM PAID MAY NOT PROVIDE
GROUNDS FOR MID-TERM POLICY CANCELLATION

In *Anderson v. Pennsylvania National Mutual Insurance Co.*²⁴⁸ the South Carolina Supreme Court held that a surcharge, based on the South Carolina Merit Rating Plan²⁴⁹ and billed to the insured after the renewal premium had been paid, was an attempted contract modification.²⁵⁰ The court further held that since the additional premium was not a part of the contract, the insured's failure to pay did not give the insurance company grounds to cancel the policy in mid-term.²⁵¹

Prior to the expiration date of her then current policy, Mrs. Allie Anderson received a renewal policy premium from Pennsylvania National. The notice, dated January 19, 1978, showed a total premium of \$653 for the renewal period of February 28, 1978 through February 27, 1979. On or before the due date, Mrs. Anderson went to the office of her local agent, where she made a cash down payment and arranged to finance the balance of the premium with Interstate Finance Company.²⁵²

On February 27, 1978, Pennsylvania National sent Mrs. Anderson a surcharge premium based on driving violations charged to her son, a permissive driver under the policy, during the thirty-six months prior to the policy renewal date.²⁵³ Mrs. Anderson never paid this premium and the policy was cancelled on December 15, 1978.²⁵⁴

248. 279 S.C. 304, 306 S.E.2d 597 (1983).

249. Ins. Dep't Reg., S.C. CODE ANN. (R. & REG.) 69-13.1 (1976 & Supp. 1983). Insurance regulations are authorized by S.C. CODE ANN. § 38-37-1490 (1976).

250. 279 S.C. at 305, 306 S.E.2d at 598.

251. *Id.* at 306, 306 S.E.2d at 598.

252. Record at 33, 52 & 65. The exact date on which Mrs. Anderson went to her agent is unclear.

253. *Id.* at 73. Apparently, there was no issue of misrepresentation. The surcharge of \$241.00 was based on information the company obtained from the Highway Department. *See id.* at 39. The absence of any reference in the record to a renewal application or misrepresentation supports the author's assumption that Mrs. Anderson never made any pre-renewal representations concerning her son's driving record. *See* Record.

254. *Id.* at 42. In fact, the agent advanced the surcharge premium to Mrs. Anderson in March by remitting the amount due to the company. He testified that he made repeated efforts to collect, but finally decided he had no choice but to cancel. The cancellation notice was mailed November 28, 1978. The mailing was certified by a post office receipt, but no return receipt was requested. *Id.* at 48. Mrs. Anderson denied receiving

Mrs. Anderson's son was involved in an automobile accident in North Carolina on January 14, 1979, in which the insured vehicle was destroyed. The insurance company refused to pay the claim which Mrs. Anderson filed under the policy.²⁵⁵ Mrs. Anderson then filed suit in the Court of Common Pleas of Anderson County, and the jury returned a verdict in her favor. Pennsylvania National appealed.²⁵⁶

The issue on appeal was whether a surcharge under the South Carolina Merit Rating Plan²⁵⁷ (the "Plan") was an element of the original contract or a "modification thereafter attempted."²⁵⁸ Pennsylvania National insisted that "the surcharge could be levied at anytime"²⁵⁹ because the "Plan" was "incorporated into every insurance policy."²⁶⁰ The company argued that the language of Regulation 69-13.1²⁶¹ suggested that an endorsement reflecting prior term charges was allowed. The court disagreed, finding "no authority or public policy to support . . . [the insurance company's] reading of the . . . [regulation]."²⁶² The court, citing *Howard v. American Southern Insurance Co.*,²⁶³ concluded that the record amply supported the trial court's decision to treat the endorsement as an attempted modification. Since the evidence showed that the insured had rejected the offer of modification, the court reasoned that the insured had no obligation to pay and the insurance company no right to cancel.²⁶⁴

In *Howard*, a Georgia Court of Appeals decision, the insured submitted an application stating that he had no violations during the prior thirty-six month period. The insured's State of

the cancellation notice. *Id.* at 18.

255. *Id.* at 10-12.

256. 279 S.C. at 304, 306 S.E.2d at 597; Brief of Appellant at 1-2.

257. Ins. Dep't Reg., S.C. CODE ANN. (R. & REG.) 69-13.1 (1976 & Supp. 1983).

258. 279 S.C. at 305, 306 S.E.2d at 597. On appeal, Pennsylvania National also argued that because the bill was issued prior to renewal, it was not a modification. This argument was not considered, however, since it was not raised at trial. *See id.* at 305, 306 S.E.2d at 598.

259. *Id.* at 305, 306 S.E.2d at 598.

260. Brief of Appellant at 17.

261. That regulation reads in part, "[N]o policy shall be endorsed to reflect any mid-term change in the driving records of the operators covered by the policy." Ins. Dep't. Reg., S.C. CODE ANN. (R. & REG.) 69-13.1 (1976 & Supp. 1983).

262. 279 S.C. at 306, 306 S.E.2d 598.

263. 148 Ga. App. 25, 251 S.E.2d 7 (1978), *petition for cert. filed*.

264. 279 S.C. at 306, 306 S.E.2d at 598.

Georgia driving records, however, showed otherwise.²⁶⁵ The insurance company discovered the discrepancy after issuing the policy and billed the insured to cover the additional risk. The insured never paid and the company cancelled the policy. The Georgia court held the additional premium to be an unbinding attempt to modify the contract, which was rejected by the insured. Since the insured was not in arrears on his original premium payments, the insurance company could not cancel.²⁶⁶ While factually similar to *Howard*, *Anderson* can be distinguished because Mrs. Anderson did not make *any* representations concerning her son's driving record when she renewed the policy.²⁶⁷

There is clearly a statutory right to cancel automobile insurance policies in mid-term for failure to pay the premiums.²⁶⁸ It is equally clear that the South Carolina Merit Rating Plan allows an insurance company to charge an additional premium based on driving violations of listed drivers during either the thirty-six months prior to the policy inception date, or at the insurer's option, during the thirty-three months preceding the determinative date, *i.e.*, three months prior to the renewal date.²⁶⁹ The Regulation is silent, however, concerning when the insurance company is permitted to bill for these surcharges.

265. The court's opinion in *Howard* fails to reveal whether the insured misrepresented his driving record on the application or if the state's records were in error. 148 Ga. App. at 26, 251 S.E.2d at 8.

266. *Id.* The court in *Howard* concluded that the additional risk assumed by the company was not sufficient consideration for the additional premium requested. *See id.* Cf. *Turner v. Worth Ins. Co.*, 11 Ariz. App. 403, 406, 464 P.2d 990, 993, *vacated on other grounds*, 106 Ariz. 132, 472 P.2d 1 (1970). The court determined that the insured's failure to list all violations on his application prevented a meeting of the minds as to the contract terms.

267. *See supra* note 253 and accompanying text.

268. S.C. CODE ANN. §§ 38-37-1310(1), -1440(1) (1976). Section 38-37-1310 prohibits mid-term cancellation except for reasons specified in the statute. Subsection (1) allows cancellation if "[t]he named insured fails to discharge when due any of his obligations in connection with the payment of premium for [the] policy or any installment thereof. . . ." Section 38-37-1440 prohibits policy cancellation except for one of two reasons, the first being "nonpayment of premium." Section 38-37-1410(4) defines "[n]onpayment of premium" to include failure to pay a policy obligation whether the premium is payable directly to the company or "its agent" or indirectly under any premium finance plan (emphasis added). It is clear from these provisions that had the surcharge been part of the original premium, cancellation for nonpayment would have been allowed.

269. Ins. Dep't. Reg., S.C. CODE ANN. (R. & REG.) 69-13.1 (1976 & Supp. 1983).

In *Government Employees Insurance Co. v. Mackey*²⁷⁰ and *Gallmon v. American Employers Insurance Co.*,²⁷¹ the South Carolina Supreme Court permitted policy cancellations for non-payment of premiums charged after policy issuance.²⁷² Both cases are factually similar to *Howard* in that representations were made by the insured in each.

In *Mackey* the insured was quoted a premium, made a downpayment, and financed the balance, after completing an application stating "that there were no violations against either of the operators of the insured vehicle."²⁷³ The application was assigned to the insurance company, which, during its customary review process, obtained a Highway Department report "show[ing] an offense of 'driving uninsured' " by Mrs. Mackey's son.²⁷⁴ The insurance company issued the policy and billed the insured for an additional amount based on that offense. The premium was not paid because Mrs. Mackey insisted that the report was wrong. Although the report was indeed wrong, Mrs. Mackey produced no evidence of that until the policy had been cancelled. The issue in *Mackey* was whether the insurance company had a right to rely upon the Highway Department records. The court held that the records supplied prima facie evidence of offenses and that the company had a right "to rely thereon in the absence of any contrary showing by the insured."²⁷⁵

In *Gallmon*, the insurance company, after renewing the policy, discovered that Highway Department records showed that a permissive male driver was only twenty-four years old. The renewal premium was based on his being twenty-five. Because of the increased risk, the company billed the insured for an additional premium. The driver was, in fact, twenty-five. The insured refused to pay the additional premiums and the policy was cancelled. The court held that *Mackey* controlled and allowed the cancellation.²⁷⁶

Although apparently not presented in *Mackey* or *Gallmon*,

270. 260 S.C. 306, 195 S.E.2d 830 (1973).

271. 272 S.C. 369, 252 S.E.2d 124 (1979).

272. 260 S.C. at 313-14, 195 S.E.2d at 833; 272 S.C. at 372-73, 252 S.E.2d at 125.

273. 260 S.C. at 310, 195 S.E.2d at 831.

274. *Id.* at 311, 195 S.E.2d at 832.

275. *Id.* at 315, 195 S.E.2d at 834. Pennsylvania National relied heavily on these decisions. See Brief of Appellant at 13-15.

276. 272 S.C. at 373, 252 S.E.2d at 125.

the contract modification argument is likely to be made when similar fact patterns occur in the future. This argument is particularly useful if the court's public policy goal is to maintain liability insurance on the maximum number of cars.

In *Howard* the Court of Appeals of Georgia failed to specify whether the Georgia driving records or the insured provided the correct information.²⁷⁷ However, as in *Mackey* and *Gallmon*, the insured was the source of the information upon which the original premium was based. When erroneous information is provided by the insured, the company should have the right to adjust the premium. If the Georgia driving records were correct, the contract modification analysis was not appropriate. The company was not modifying. It was correcting the assumptions upon which the premium was calculated. If the insured provided false or misleading data, the case is one of misrepresentation, and the insurer should have the right to cancel or to adjust the premium to reflect the true risk for which it contracted.²⁷⁸ If the

277. See *supra* note 265.

278. Section 38-37-1310(2) allows cancellation if "[t]he insurance was obtained through material misrepresentation. . . ." This provision appears to permit cancellation of the policy without consideration of the nonpayment issue. However, this section is part of Article 17 which contains 1964, 1965 and 1966 provisions. It may be superseded by § 38-37-1440, a 1970 provision, to the extent the two conflict. Section 38-37-1440 permits cancellation in only two situations, neither of which is misrepresentation. See *supra* note 268 and accompanying text.

If § 38-37-1310(2) is still effective, an insurer can cancel for any material misrepresentation, whether fraudulently made or not. If the statute has been overruled, South Carolina case law allows an insurer to rescind an insurance contract for misstatements by the insured in two circumstances. First, if the statements were representations, the company must show that the statements were untrue and that the falsity was known to the insured, "that they were material to the risk, and relied on by the insurer, and that they were made with the intent to mislead and defraud the insurer." *Gov't Employees Ins. Co. v. Chavis*, 254 S.C. 507, 513, 176 S.E.2d 131, 134 (1970). Second, if the misstatement is a warranty, the proof of its untruth is an express breach of contract "regardless of the good faith and honest purpose of the insured. . . ." *Kizer v. Woodmen of the World*, 177 S.C. 70, 78, 180 S.E. 804, 807 (1935). See, e.g., *Home Fire and Marine Ins. Co. v. Tisdale*, 303 F.2d 348, 350 (4th Cir. 1962). "A warranty . . . is a statement, description, or *undertaking* on the part of the insured, appearing in the policy of insurance or in another instrument properly incorporated in the policy, relating contractually to the risk insured against." *Reid v. Hardware Mut. Ins. Co.*, 252 S.C. 339, 346, 166 S.E.2d 317, 321 (1969) (*emphasis added*).

Whether a statement is a representation or a warranty depends on the contract language and the intent of the parties. *Kizer*, 177 S.C. at 77, 180 S.E. at 807. See generally 7 COUCH, CYCLOPEDIA OF INSURANCE LAW 2d §§ 35.108-35.131 (rev. ed. 1961 & Supp. 1983); 7 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 301.4 (3d ed. 1966); 12A APPLEMAN, INSURANCE LAW AND PRACTICE §§ 7291-7360 (1981). If applications are made warranties, the

records were wrong, as in *Mackey* and *Gallmon*, the charge of an additional premium without any additional risk could easily be characterized as an attempt to modify the original contract. Thus, the insured would have no obligation to pay and cancellation should be prohibited.

Treating a merit rating plan surcharge as a contract modification makes sense in limited factual situations like that in *Anderson*. Pennsylvania National knew about the surcharge violations by January 10th.²⁷⁹ Yet, they did not include the additional amount in the January 19th renewal notice. Mrs. Anderson did not misrepresent her son's driving record or deny the violations. She merely alleged that the company had no right to change the contract terms once she had accepted them. There is no reason to allow an insurance company to bill less at renewal when it is going to bill more later.

The flaw in this line of reasoning is that it renders the thirty-six month period of the Regulation meaningless. If an insurance company has the right to base the Merit Rating Surcharge on violations occurring up to the policy date, it is logical to assume that it will wait to check for last minute violations before sending out the surcharge premium notice.²⁸⁰ Obviously, these records will never be available before the policy is issued. After *Anderson*, insurance companies that want to collect merit rating plan premiums have several choices. They may renew first and bill the "whole" premium later, use the alternative thirty-three month period, or issue the policy pursuant to an agreement with the insured that the premium is subject to adjustment upon receipt of a Highway Department report.²⁸¹

The real significance of *Anderson* will be determined by subsequent cases. Read narrowly, it may be applied only in situations when the insurer is aware of chargeable violations and unnecessarily delays billing. Read more broadly, any endorsement

insurer can void the policy for misstatements regardless of fraudulent intent or materiality. It can then offer to issue another policy under terms commensurate with the risk involved.

279. Record at 46-47.

280. In fact, Pennsylvania National seemed to be trying to do just this. See Record at 39.

281. The trial court's principle objection seemed to be that Mrs. Anderson was unaware that an additional premium might be charged and hence was deprived of an opportunity to fairly negotiate the terms of the contract. See Record at 51-56.

billed after the original premium might be held to be an ineffective attempt to modify the contract and hence not grounds for cancellation if unpaid. Because the South Carolina Supreme Court seems determined to maintain continuous insurance coverage on all vehicles licensed in the state, a broad reading should be anticipated.

Elizabeth Bowe Anders

VII. AUTOMOBILE DEALERS' FAILURE TO OBTAIN CREDIBLE INSURANCE INFORMATION FROM BUYERS MAY PREVENT TRANSFER OF OWNERSHIP

In *American Mutual Fire Insurance Co. v. Southland Motors Inc.*,²⁸² the South Carolina Supreme Court held that an automobile dealership retained, for insurance purposes, ownership of a new car which had been "sold" and delivered to a buyer who failed to obtain liability insurance.²⁸³ A provision of a garage liability policy purporting to exclude coverage "with respect to any automobile . . . possession of which had been transferred to another . . . pursuant to an agreement of sale"²⁸⁴ was held ineffective because it contradicted South Carolina's statutory omnibus clause.²⁸⁵ *American Mutual* indicates that the court continues to regard maintenance of continuous insurance coverage as a primary purpose of the title and registration statutes.²⁸⁶ Unfortunately, the court gives no basis for its holding, leaving uncertain the South Carolina law of vehicle title transfer.

On June 14, 1976, Marine Private Christopher Smith decided to buy a new MG Midget from Southland Motors. The salesman gave Smith a copy of the retail buyer's order to take to his credit union to obtain financing. Smith paid a \$100.00 deposit, signed the odometer mileage statement and a statement certifying that he owed no personal property taxes, and received

282. 279 S.C. 101, 302 S.E.2d 854 (1983).

283. *Id.*

284. *Id.* at 104, 302 S.E.2d at 855.

285. *Id.* The statutory omnibus clause consists of two code sections, S.C. CODE ANN. §§ 56-9-810, 56-9-820 (1976). In general, an omnibus clause extends coverage under an automobile liability policy to persons using the automobile owned by the named insured with explicit or implied permission of the owner. BLACK'S LAW DICTIONARY 981 (5th ed. 1979). South Carolina had made such coverage mandatory.

286. *See Travelers Ins. Co. v. Lawson*, 276 S.C. 587, 590, 281 S.E.2d 116, 118 (1981).

a military sales tax exemption form.²⁸⁷ Smith also signed a South Carolina Highway Department form certifying that he had an insurance policy "meeting the requirements of the South Carolina Financial Responsibility Act."²⁸⁸ He was unable to supply the policy number and effective dates but promised to bring the required information when he returned to pick up the car.²⁸⁹

When Smith returned the next day his salesman was not on duty. He gave a check for \$4,181.00, \$120.80 short of the purchase price, to another salesman who delivered the car to him. He did not return the sales tax exemption form or his policy number. The second salesman testified that Smith told him he had left that information at the credit union and would bring it in the next day, but Smith denied having made this statement.²⁹⁰

Smith never returned to Southland. Although Southland customarily secured registration and title for its customers, it could not complete the procedure for Smith without the insurance policy number and dates.²⁹¹ Twenty-six days later, Smith struck and seriously injured John Penton. Although dealer plates expire ten days after sale, Southland's plates were still on the car.²⁹²

Penton first brought a damage action against Southland Motors and Smith. In that action Southland was granted a summary judgment and Smith was held liable for \$350,000.²⁹³ American Mutual, Penton's insurer then brought this suit for a declaratory judgment to determine whether Smith was an

287. 279 S.C. at 102-03, 302 S.E.2d at 854-55.

288. *Id.* at 103, 302 S.E.2d at 855.

289. *See* Record at 34, 165.

290. 279 S.C. at 103, 302 S.E.2d at 855.

291. Record at 64, 79. According to Southland's president, the Highway Department would not have processed the papers without the policy number and dates. *Id.* *See infra* note 306 and accompanying text.

292. 279 S.C. 103, 302 S.E.2d at 855. Smith's salesman testified that he had tried to reach Smith at the barracks on several occasions. Since dealer plates are not valid after ten days he apparently believed Smith would be forced to return and, hence, probably did not pursue him strenuously. *See* Record at 27, 35 & 49. S.C. CODE ANN. § 56-3-210 (1976) provides a ten day grace period for procuring registration and license plates. Since the registration materials were still in the possession of Southland, it is at least arguable that Southland should have been on notice that Smith might not have procured insurance two weeks before the accident.

293. Record at 2. The theory on which Southland Motors was joined as a defendant is not clear from either the record or the opinion.

uninsured motorist or whether Southland's garage liability insurance provided coverage for the vehicle. The trial court held that Southland's policy, issued by Universal Underwriters, covered the vehicle.²⁹⁴

The supreme court affirmed on appeal. The court reviewed the evidence and found that it provided ample support for the trial court's three factual findings: that Southland retained ownership of the car; that Universal's attempt to exclude coverage contradicted the statutory omnibus clause; and that "the [exclusionary] clause contradict[ed] other provisions of the policy thus creating an ambiguity which [had to] be resolved in favor of maintaining coverage."²⁹⁵

American Mutual makes it clear that automobile dealers and their insurers face potential liability when they sell to an individual who fails to procure insurance. However, the basis for that liability is unclear. The opinion itself consists only of a review of the facts of the case and an affirmation of the trial court's findings. Not a single case or statute is cited by the court in its discussion of ownership. There are, however, several prior cases which may illuminate the holding in *American Mutual*.

First, *American Mutual* may be read as overruling two earlier South Carolina cases which held that compliance with the title certificate law was not necessary to transfer title.²⁹⁶ Title certificate laws describe the method of effectuating title transfers. In some states these methods are mandatory and record title is conclusive proof of ownership.²⁹⁷ In other states title certificates are only prima facie evidence of ownership.²⁹⁸

*Grain Dealers Mutual Insurance Co. v. Julian*²⁹⁹ and *St. Paul Fire and Marine Insurance Co. v. Boykin*³⁰⁰ were declara-

294. 279 S.C. at 101, 302 S.E.2d at 854.

295. *Id.* at 104, 302 S.E.2d at 855.

296. *St. Paul Fire and Marine Ins. Co. v. Boykin*, 251 S.C. 236, 161 S.E.2d 818 (1968); *Grain Dealers Mut. Ins. Co. v. Julian*, 247 S.C. 89, 145 S.E.2d 685 (1965).

297. *See, e.g., Greer v. Zurich Ins. Co.*, 441 S.W.2d 15 (Mo. 1969); *Nationwide Mut. Ins. Co. v. Motorist Mut. Ins. Co.*, 116 Ohio App. 22, 186 N.E.2d 208 (1961); *Farm Bureau Mut. Auto. Ins. Co. v. Motorists Mut. Ins. Co.*, 110 Ohio App. 12, 168 N.E.2d 159 (1957).

298. *See, e.g., Am. Hardware Mut. Ins. Co. v. Muller*, 98 N.J. Super. 119, 236 A.2d 182 (1967), *aff'd*, 103 N.J. Super. 9, 246 A.2d 493 (1968); *Phoenix Ins. Co. v. Guthiel*, 2 N.Y.2d 584, 141 N.E.2d 909, 161 N.Y.S.2d 874 (1957).

299. 247 S.C. 89, 145 S.E.2d 685 (1965).

300. 251 S.C. 236, 161 S.E.2d 818 (1968).

tory judgment actions brought by insurance companies in which vehicle ownership determined liability under an insurance policy. In both cases the sellers failed to comply with the title certificate law, the buyers had no insurance, and automobile accidents occurred. In neither case did the seller's failure to comply prevent the buyer from being found legal owner of the car.³⁰¹

Grain Dealers concerned a casual sale between individuals. Section 46-150.15 (now Section 56-19-360) of the South Carolina Code requires a seller who has title to a vehicle to deliver the documents necessary to transfer title to either the buyer or the Highway Department.³⁰² The seller did neither but the court concluded "under the facts . . . disclosed . . . even though [the buyer] did not have a certificate of title . . . he was, in fact, the owner of the automobile. . . ." ³⁰³

In *St. Paul*, an automobile dealer bought and resold a used car without having title transferred to its name. Section 46-150.16 (now Section 56-19-370) of the South Carolina Code requires a dealer in that situation to deliver all necessary documents to the Highway Department.³⁰⁴ However, in *St. Paul*, the dealer-seller, having endorsed the certificate of title and the registration and properly executed the transfer form, gave these documents, and the application for a new certificate of title, to the buyer for processing. Although the buyer never completed the transfer, the court held "[c]ompliance with the Title Certificate law is not necessary to transfer ownership under 46-150.16." ³⁰⁵

Although *American Mutual* involves a slightly different sales situation to which section 56-19-240³⁰⁶ arguably applies,

301. *Id.* at 241-42, 161 S.E.2d at 821; 247 S.C. at 99, 145 S.E.2d at 690.

302. S.C. CODE ANN. § 56-19-360 (1976).

303. 247 S.C. at 99, 145 S.E.2d at 690.

304. S.C. CODE ANN. § 56-19-370 (1976).

305. 251 S.C. at 242, 161 S.E.2d at 821.

306. S.C. CODE ANN. § 56-19-240 (1976) reads in pertinent part: "If the application refers to a vehicle purchased from a dealer, it shall . . . be signed by the dealer as well as the owner, and the dealer shall promptly mail or deliver the application to the Department." (emphasis added).

This section has since been amended to apply to all certificate applications. S.C. CODE ANN. § 56-19-240 (Supp. 1983). Since the MG Midget had never been titled, Southland was obliged by § 56-19-240 to apply for the first title. Southland and Universal took the position that § 56-19-360, which allows a dealer who holds title to a vehicle to deliver the transfer documents to either the buyer or the Department, applied exclusively. American Mutual and Penton argued that § 56-19-240 limited § 56-19-360, requiring

the following language which appears in both of the earlier decisions is quite broad and would seem applicable to all statutes prescribing transfer mechanisms: "We have no statute which makes void transfers of sales of motor vehicles which are not made in compliance with the terms of the Title Certificate law."³⁰⁷ Section 56-19-240 requires dealer-sellers of new automobiles to mail or deliver the application for first certificate of title, accompanied by the manufacturer's certificate of origin, to the Highway Department.³⁰⁸ On the date of the accident, Southland still held the necessary transfer documents. Thus, Southland's failure to deliver the documents may have prevented the transfer of ownership, signaling that compliance is now mandatory and that *Grain Dealers* and *St. Paul* are no longer good law.

Since the court cites neither case law nor the title certificate law, a more likely basis for the holding is intent. Even if compliance with title statutes is not always necessary to effectuate a change in ownership, section 56-19-320³⁰⁹ makes a certificate of title prima facie evidence of ownership, which the record owner may rebut by presenting evidence that someone else is the true owner.³¹⁰ There was no title certificate in *American Mutual*, but in its absence the trial judge reasoned that the manufacturer's statement of origin was prima facie evidence of Southland's ownership.³¹¹ He thought Southland had failed to rebut the presumption in part because it had failed to comply with the statutes: "[S]uch failure [while not conclusive] . . . stands as strong evidence that Southland intended to remain as owner of the

Southland to mail the application for certificate of title to the Department. The trial court did not decide this question since "the terms of *neither* statute were complied with." (emphasis in original). Record at 145. Although § 56-19-360 appears to mandate compliance to effectuate transfer, it specifically excepts "the parties" from this result. See Brief of Appellant at 19-20. Section 56-19-240 has no similar exception.

307. 247 S.C. at 99, 145 S.E.2d at 690; 251 S.C. at 241-42, 161 S.E.2d at 821 (citing 247 S.C. at 99, 145 S.E.2d at 690).

308. See *supra* note 306 and accompanying text.

309. S.C. CODE ANN. § 56-19-320 (1976).

310. See 247 S.C. at 98, 145 S.E.2d at 689. See also *Tollinson v. Reaves*, 277 S.C. 443, 445, 289 S.E.2d 163, 164 (1982); *Bankers Ins. Co. of Pa. v. Griffin*, 244 S.C. 552, 556, 137 S.E.2d 785, 786 (1964).

311. Record at 145. The trial judge thought § 56-19-320 could reasonably be extended to a manufacturer's statement of origin. Although the judge found that the statement of origin listed Southland as owner, Southland contested this finding on appeal. Brief of Appellant at 24-25. See also Record at 161-62.

automobile.”³¹²

The trial court also distinguished both *Grain Dealers* and *St. Paul* on intent grounds: “[I]n both [cases] . . . the evidence showed that the seller intended that ownership pass to the purchaser. . . .”³¹³ The seller in *Grain Dealers* delivered a registration and bill of sale to the purchaser who executed a chattel mortgage in which he “represented that he was the sole owner of the automobile.”³¹⁴ In *St. Paul*, the automobile dealer-seller delivered all necessary transfer documents to the buyer rather than to the Highway Department.³¹⁵

More recently, a third case, *Travelers Insurance Co. v. Lawson*,³¹⁶ was decided on the basis of intent. In *Travelers* no formal title transfer was made, but the *buyer* added the vehicle to his insurance policy. The court held that in these circumstances the buyer and seller clearly intended to transfer ownership and found the buyer’s insurance company to be solely liable.³¹⁷ Apparently action by either the buyer or the seller may suffice to show the requisite intent. In this context, *American Mutual* is particularly significant because it deals with an issue specifically reserved by *Travelers*. The court in *Travelers* noted:

In holding that *Travelers* is responsible, we do not necessarily imply that Penn National and/or the seller would not under any circumstances be liable in a different factual situation. For example, if the buyer had not procured insurance coverage, a different issue would be presented. The public has been pro-

312. Record at 146. Judge Robinson noted several other factors which he considered indicative of Southland’s intention to retain ownership, including: (1) Southland’s failure to deliver the documents to anyone; (2) the salesman’s delivering the car without full payment or completion of the sales tax exemption form; and (3) the salesman’s apparent doubt of the existence of Smith’s insurance policy. Since Southland was eager to make a sale, Judge Robinson reasoned that it was logical to assume it intended to give Smith use of the car while retaining ownership and while supplying continuous insurance coverage. See *id.* at 146-47.

313. *Id.* at 141. Judge Robinson interpreted *Grain Dealers* and *St. Paul* to mean that *technical* noncompliance with the title certificate laws will not prevent a transfer of ownership when there is evidence to show an intent to pass ownership. *Id.* at 140. See also *S.C. Farm Bureau v. Scott*, 274 S.C. 264, 266-67, 262 S.E.2d 739, 740 (1980) (ownership for purposes of insurance coverage decided in light of particular facts and circumstances of the case).

314. 247 S.C. at 94, 145 S.E.2d at 687.

315. 251 S.C. at 238, 161 S.E.2d at 819.

316. 276 S.C. 587, 281 S.E.2d 116 (1981).

317. *Id.* at 589-90, 281 S.E.2d at 117-18.

tected. As between the buyer and seller, the buyer should be responsible.³¹⁸

Although not the only factor, *Travelers* indicates that insurance is an important factor in determining intent to transfer title. If the buyer is insured, intent is shown; if not, the seller must show intent by his own actions.

American Mutual does not make clear exactly what actions are necessary, but certainly a dealer cannot retain the documents necessary for title registration and then argue that it intended to relinquish control over the vehicle.³¹⁹

The final possible explanation for *American Mutual* is an estoppel theory. In *St. Paul* the court stated, "[L]iability insurance or its equivalent is not a requirement for ownership of a motor vehicle or for obtaining a certificate of title but it is a prerequisite to licensing and registration of the motor vehicle. . . ."³²⁰ Furthermore, "[t]he duty of complying with the registration statutes is placed on the owner of a motor vehicle."³²¹ When a dealer undertakes to apply for registration and licensing as did Southland, it should be estopped from denying ownership since the vehicle would otherwise be uninsured.

Whether mandatory compliance, intent, or estoppel is the theoretical basis of *American Mutual*, the title statutes play an important part in determining ownership. Fundamentally, the holder of record title will be presumed to be the owner. This presumption will hold unless the buyer evidences a contrary intent by purchasing insurance, or the dealer-seller shows by positive action an intent to permanently relinquish its claim to the vehicle. It is unclear, however, after *Travelers* and the amendment to section 56-19-240,³²² whether delivery of transfer documents by the dealer to the purchaser will support a finding of intent when the buyer does not procure insurance. Since section 56-19-240 appears to require dealers in all situations to mail or deliver the documents to the Highway Department, a good faith

318. *Id.* at 590, 281 S.E.2d at 118.

319. S.C. CODE ANN. § 56-3-200 (1976) prevents registration until title has been applied for or issued. A dealer who retains the title application prevents the purchaser from registering and licensing, i.e., operating the vehicle.

320. 251 S.C. at 241, 161 S.E.2d at 821.

321. *Id.* (emphasis added).

322. See *supra* note 306 and accompanying text.

effort to comply with the title certificate law may not be sufficient evidence of intent. In practice, the Department will not issue titles without concurrent registration.³²³ Since registration is conditioned upon insurance, a dealer who wishes to show intent by compliance will have to supply the Department with credible insurance data.³²⁴ Furthermore, this Department practice in effect forces the dealer to assume the registration duty so that failure to supply the required information may estop the dealer from denying ownership.

Realizing that dealer-sellers will often retain ownership after vehicles are delivered to potential buyers, what can a garage insurer do to limit its exposure? Apparently nothing. The South Carolina statutory omnibus clause requires that every insurance policy issued to an owner of a motor vehicle cover any person "who uses [the covered motor vehicle] with the consent, expressed or implied, of the named insured."³²⁵ In a sales situation it would be difficult indeed for an insurer to assert convincingly that the dealer did not give at least implied permission to a prospective purchaser.

The basis for the *American Mutual* holding may be obscure, but the message it sends is clear. There will be continuous liability insurance coverage for every vehicle in this state if any possible justification for that liability can be established. Garage insurers can only demand that their insureds comply with all applicable statutes and obtain adequate insurance data before giving up possession.

Elizabeth Bowe Anders

VIII. CANCELLATION OF AN INSURANCE POLICY AS A DEFENSE

*Edens v. South Carolina Farm Bureau Mutual Insurance Co.*³²⁶ came before the South Carolina Supreme Court in May of 1983. In its decision, *Edens I*,³²⁷ the court held that South Carolina law does not require an insurer to prove that the insured actually received notice of cancellation in order for the policy

323. See Record at 104 (deposition testimony of Highway Department employee).

324. S.C. State Highway Dept. R., S.C. CODE ANN. (R. & REG.) 63-441 (1976).

325. S.C. CODE ANN. § 56-9-810(2) (1976).

326. *Edens v. S.C. Farm Bureau Mut. Ins. Co.*, No. 21929 (S.C. filed May 25, 1983).

327. The court's initial opinion shall be referred to hereinafter as *Edens I*.

cancellation to be effective. The insurer need prove only that it properly mailed the notice to the insured's address.³²⁸ In October 1983, the court granted a rehearing, and upon reconsideration, withdrew *Edens I* and substituted *Edens II*,³²⁹ which held that actual receipt of notice of cancellation is a condition precedent to cancellation of an insurance policy which does not otherwise specify a method of cancellation.³³⁰ With this opinion, South Carolina adopted the majority rule.³³¹

The plaintiff, J.M. Edens, Jr., owned a homeowner's insurance policy, issued by the defendant, for approximately twenty years. In January 1974, Edens sent the defendant a check to renew the insurance policy that covered his home, valued at seventy thousand (\$70,000) dollars, and its contents, valued at thirty-five thousand (\$35,000) dollars. In the fall of that year, the house was totally destroyed by fire. The insurance company refused to honor Edens' claim because of an alleged cancellation of the policy two months before the fire.³³²

The defendant alleged that on August 13, 1974, it sent plaintiff a cancellation notice and a refund of the unearned premium. Defendant followed its "normal cancellation procedure" which included entering Edens' name and correct address in defendant's mailing book, taking Edens' cancellation notice and refund check to the post office, paying the postage, giving the envelope to the post office clerk, and receiving a post office receipt for the envelope. Edens claimed he never received the notice of cancellation or the refund check, which never cleared the bank. The Federal Land Bank and the National Bank of South Carolina, holders of mortgages on the property, received notice of cancellation but never informed Edens.³³³

Edens brought this action against his insurer, South Carolina Farm Bureau Mutual Insurance Co. (Farm Bureau), to recover proceeds under his insurance policy. The jury found for Farm Bureau and Edens asked for a directed verdict or a judg-

328. *Edens I*, No. 21929, slip op. at 3.

329. *Edens v. S.C. Farm Bureau Mut. Ins. Co.*, 279 S.C. 377, 308 S.E.2d 670 (1983)[hereinafter cited as *Edens II*].

330. *Id.* at 380, 308 S.E.2d at 671. This holding was the direct opposite of that of *Edens I*, as what had been the dissent became the majority.

331. See *infra* note 353 and accompanying text.

332. 279 S.C. at 379, 308 S.E.2d at 671.

333. *Id.* at 381, 308 S.E.2d at 672.

ment *non obstante veredicto*. The trial judge refused to grant either, and Edens appealed. In *Edens I*, the South Carolina Supreme Court held for Farm Bureau.³³⁴ In *Edens II*, the court reversed and remanded for entry of judgment in favor of Edens.³³⁵

There appears to be no authority which has determined definitively whether actual receipt by the insured of a cancellation notice mailed by the insurer is a condition precedent to a valid cancellation of the policy.³³⁶ The issue has been resolved, however, by interpretation of the language of an applicable statute,³³⁷ or, in the absence of a statute, by interpretation of the language of the policy.³³⁸ The general rule is that a cancellation provision should be construed strictly in favor of the insured.³³⁹ Thus, an ambiguous cancellation provision will be construed as requiring actual receipt of notice by the insured. Many insurance companies have attempted to avoid this result by clearly specifying in their policies that mailing of a cancellation notice constitutes sufficient notice.³⁴⁰

The cancellation clause of Edens' insurance contract allowed for cancellation "by giving to the insured a five days' written notice of cancellation."³⁴¹ The court found this provision to be "clearly ambiguous" in describing the method for giving notice. Where the language of an insurance policy is ambiguous or capable of two reasonable interpretations, the construction that

334. *Edens I*, No. 21929, slip op. at 3.

335. 279 S.C. at 378, 308 S.E.2d at 671.

336. 43 AM. JUR.2d *Insurance* § 391 (1982) and cases cited therein. See also Annot., 64 A.L.R.2d 982 (1959 & Later Case Service 1984) and cases cited therein. *Black v. Fidelity & Guar. Ins. Underwriters*, 582 F.2d 984 (5th Cir. 1978), and *Ampy v. Metropolitan Casualty Ins. Co. of N.Y.*, 200 Va. 396, 105 S.E.2d 839 (1958), speak of this apparent conflict of authority, and *Black*, interpreting Mississippi law, describes a way to resolve it.

337. See, e.g., *Black*, 582 F.2d at 984; *DiProspero v. Nationwide Mut. Fire Ins. Co.*, 30 Conn. Supp. 291, 311 A.2d 561 (1973).

338. See, e.g., *Pence Mortgage Co. v. Stokes*, 559 S.W.2d 500 (Ky. App. 1977); *Anchor Casualty Co. v. Crisp*, 346 S.W.2d 364 (Tex. Civ. App. 1961); *Rocque v. Co-Op. Fire Ins. Ass'n of Vt.*, 140 Vt. 321, 438 A.2d 383 (1981).

339. See *infra* note 342 and accompanying text.

340. In his dissent to *Edens I*, Chief Justice Lewis emphasized the power of insurance companies to write their own contracts. This power gives rise to the policy of construing insurance contracts in favor of the insured in case of ambiguity. Because insurance companies can include all of their own terms in the policy, they should not be allowed to benefit from ambiguity. *Edens I*, No. 21929, slip op. at 8.

341. 279 S.C. at 579, 308 S.E.2d at 671 (quoting the insurance policy).

is most favorable to the insured will be adopted.³⁴² On the facts of *Edens II*, "giving written notice" should be interpreted to mean some method of notice other than mere mailing, because if the provision were interpreted to allow the insurance company simply to drop the letter in the mail, the insured would be denied coverage.³⁴³ The court suggested that notice by registered or certified mail, or at least a request for a return receipt, would have been more effective as methods of cancellation.

The court distinguished *Moore v. Palmetto Bank & Textile Co.*³⁴⁴ on the basis of the different wording in its cancellation clause, which read as follows:

This policy may be cancelled by the company by mailing to the insured named in Item 1 of the declarations at the address shown in this policy *written notice* stating when not less than ten days thereafter such shall be effective. *The mailing of notice as aforesaid shall be sufficient proof of notice.*³⁴⁵

Another provision in the *Moore* policy stated that "[t]he mailing of notice as aforesaid shall be sufficient proof of notice,"³⁴⁶ expressly negating the necessity of actual receipt. Stating that "[t]he right to cancel a policy can be exercised only in the manner provided in the policy . . .,"³⁴⁷ the court found that cancellation by mailing was the manner specifically required; the terms "mailing written notice" and "giving written notice" were held to be neither synonymous nor substantially similar.³⁴⁸ Because "notice" implies becoming personally aware, the court in *Edens*

342. *Id.* See also *Tobin v. Beneficial Standard Life Ins. Co.*, 675 F.2d 606 (4th Cir. 1982). In *Tobin*, the appeals court set out some general rules of interpretation applicable to insurance contracts in South Carolina. In *Gaskins v. Blue Cross-Blue Shield of S.C.*, 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978), the South Carolina Supreme Court described "well established legal principles under South Carolina law governing the construction of insurance contracts."

343. *Edens II*, 279 S.C. at 379, 308 S.E.2d at 671. In *Gaskins*, 271 S.C. at 108, 245 S.E.2d at 602, the court stated that "when an insurance policy such as this one is susceptible to more than one reasonable interpretation, one of which would provide coverage, this Court must hold as a matter of law in favor of coverage."

344. 238 S.C. 341, 120 S.E.2d 231 (1961).

345. *Id.* at 344, 120 S.E.2d at 233.

346. *Id.* at 345, 120 S.E.2d at 233. See also *McElmurray v. Am. Fidelity Fire Ins. Co.*, 236 S.C. 195, 203, 113 S.E.2d 528, 532 (1960) in which the court found actual delivery to be unnecessary in light of a similar clause.

347. 238 S.C. at 344, 120 S.E.2d at 233.

348. *Edens II*, 279 S.C. at 379, 308 S.E.2d at 671.

II interpreted "giving written notice" to mean that the insured shall personally receive the notice.³⁴⁹ The court quoted from *Selken v. Northland Insurance Co.*³⁵⁰ when it found that personal receipt of a document could not be accomplished by simply depositing a document in the mail because the insured might or might not receive it.

Selken is a case of statutory interpretation. Iowa's statute required the "giving of notice" whereas the defendant's insurance policy provided for the "mailing of notice." The Iowa Supreme Court, interpreting the applicable statute, found that "giving" meant that the insured should personally receive the notice and that "notice" meant that the insured should receive it so that he or she becomes "aware of the notice."³⁵¹ Because physical delivery was required for the insured to become aware of the cancellation, the court held the policy's cancellation provision ineffective as violative of the statute. Although *Selken* interpreted a statute, the same interpretation can be applied by analogy to the similar language in the policy provisions in *Edens II*.³⁵²

The majority rule provides that when a policy permits cancellation after a specified number of days' notice to the insured, actual receipt of notice by the insured is a condition precedent to cancellation.³⁵³ Cancellation of an insurance policy is an af-

349. *Id.* See also *Selken v. Northland Ins. Co.*, 249 Iowa 1046, 90 N.W.2d 29 (1958). In *Selken*, the Iowa Supreme Court interpreted "giving written notice" in the context of the Iowa statute. The wording of the Iowa statute, at that time, was substantially similar to the cancellation clause of *Edens'* policy.

350. See discussion *supra* note 349.

351. 249 Iowa 1046, 1053, 90 N.W.2d 29, 33 (1958).

352. For other cases interpreting the language of such statutes, see *Black*, 582 F.2d at 984 (interpreting a Mississippi statute governing the cancellation of automobile insurance), and *DiProspero*, 30 Conn. Supp. at 291, 311 A.2d at 561 (interpreting the phrase "giving notice" in a cancellation statute).

353. *Edens II*, 279 S.C. at 380, 308 S.E.2d at 671. See 43 AM. JUR. 2d *Insurance* § 391 (1982) for a statement of the rule. See also Annot., 64 A.L.R.2d 982 (1959 & Later Case Service 1984) (stating the same rule along with cases that have followed it). Of course, this majority rule is premised upon a specific type of cancellation notice set by the policy.

There are basically five different types of cancellation notices: (1) Notice must be sent to the insured when no form is stipulated. Actual receipt of the notice is required. (2) Cancellation may be effected by mailing the notice to the address of the insured as stated in the policy. Mailing is sufficient to cancel. (3) Cancellation may be effected with notice to the insured within a specified number of days. Actual receipt is a condition precedent to cancellation. The time requirement is intended to give the insured timely

firmative defense, the burden of proof being on the party who asserted cancellation. In *Edens II*, the insurance company asserted cancellation but could not prove by a preponderance of the evidence that Edens actually received the notice.³⁵⁴

Justice Harwell's dissent in *Edens II* argued that the trial court adequately charged the jury when it presented the issue as two equally weighted questions: (1) whether the insured mailed the notice properly addressed with postage prepaid, and (2) whether the insured received the notice.³⁵⁵ The dissent reiterated the view, espoused by *Edens I*, that the insurer need not prove actual receipt by the insured. Justice Harwell based this view on the language in *Moore* which indicated that mere mailing was sufficient not only where a cancellation clause specifically provided that the insurer might cancel by mailing the no-

information that the policy is to be cancelled. See *Columbia Casualty Co. v. Wright*, 235 F.2d 462, 464 (4th Cir. 1956) which states that "[c]ancellation of an insurance contract, upon which the insured is relying for protection, is drastic action, and the requirement of five days' notice is obviously to enable the insured to secure insurance protection from some other company." (4) Use of the "standard cancellation provision" in which cancellation is effected by mailing to the insured, at his address, written notice stating a specified number of days in which cancellation will be effective. Mailing is specifically provided to be sufficient proof of notice and the majority rule holds that actual receipt is not a precondition under the express terms of the contract. (5) Cancellation may be made by registered mail. Actual receipt of the notice is not a condition precedent to its effectiveness. Annot., 64 A.L.R.2d 982, 988-1019 (1959 & Later Case Service 1984).

354. 279 S.C. at 380, 308 S.E.2d at 671. The court at this point stated that it was not going to reach any other issues, since the decision that the insurance policy was still in effect made this unnecessary. In *Edens I*, the plaintiff argued that the attempted cancellation of the insurance policy was ineffective because the language of the cancellation notice did not comply with the policy terms. The policy required that "[n]otice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand." Although the cancellation notice did not repeat this language, Farm Bureau claimed that it sent the refund check with the cancellation notice as required. The court held that since the refund check for the unearned premium accompanied the cancellation notice, the defendant did comply with the terms of the policy concerning premium refunds, and therefore, the policy was valid. *Edens I*, No. 21929, slip op. at 4.

355. *Edens II*, 279 S.C. at 381, 308 S.E.2d at 672. In *Glenn v. Western Union Tel. Co.*, 84 S.C. 165, 65 S.E. 1024 (1909), the South Carolina Supreme Court found that evidence of a proper mailing raises a presumption that the messages were received by the addressee. It further found that when receipt of them is denied, an equally strong presumption is raised that they were never mailed. Thus, mailing and receipt were issues of fact for the jury. In a case factually similar to *Edens II*, the Texas Court of Civil Appeals found that a like presumption was raised by evidence of proper mailing rebuttable by evidence to the contrary, such as a denial of receipt by the insured. *Anchor Casualty Co. v. Crisp*, 346 S.W.2d 364 (Tex. Civ. App. 1961). Thus, in *Edens II*, the jury charge was correct and the jury obviously did not believe that Edens had successfully rebutted the presumption of proper mailing.

tice to the insured's address but also where the clause contained *substantially similar language*. Finally, Justice Harwell agreed that the issue could have been avoided by sending the notice by registered or certified mail, but noted that the South Carolina legislature has yet to approve such a method for fire insurers, as it has for accident, health, hospitalization and automobile insurers.³⁵⁶

In *South Carolina National Bank v. Lumbermens Mutual Casualty Co.*³⁵⁷ the United States District Court for the District of South Carolina reached a result similar to that of the South Carolina Supreme Court in *Edens II*, although under slightly different circumstances. South Carolina National Bank (SCN) brought an action in contract to collect upon an automobile insurance policy issued by the defendant to Barry Bowen, with SCN, as lienholder, named the loss payee. The policy provided for notice of cancellation by mail to the insured, but failed to state the manner in which notice would be given to the lienholder. SCN never received notice of the cancellation and for that reason the court found the cancellation ineffective as to SCN, stating: "This policy required Plaintiff be given prior notification. No particular method of notice was specified. The generally accepted rule is that where an insurance policy simply requires notice, without stipulating any particular form, actual receipt of such notice is a condition precedent to cancellation by

356. *Edens II*, 279 S.C. at 382 n.1, 308 S.E.2d at 672 n.1. S.C. CODE ANN. § 38-35-110 (1976), in referring to cancellation of accident, health and hospitalization policies, states that an "insurer may cancel this policy by written notice delivered to the insured or mailed to his last address as shown by the records of the insurer, stating when, not less than five days thereafter, such cancellation shall be effective." S.C. CODE ANN. § 38-37-1450 (1976), in referring to cancellation of an automobile insurance policy, states that "no cancellation . . . by an insurer of a policy of automobile insurance shall be effective unless the insurer shall deliver or mail, to the named insured at the address shown in the policy, a written notice of the cancellation. . . ." Some jurisdictions which follow the "minority view" might not interpret the cancellation statute for accident, health and hospitalization policies in the manner that the dissent assumes. *Serves v. Eureka Casualty Co.*, 103 Ohio App. 268, 3 Ohio Ops. 2d 307, 144 N.E.2d 120 (1957) and *Smith v. Globe Am. Casualty Co.*, 38 Ohio Misc. 82, 313 N.E.2d 21 (1973) both contain good expositions of the minority rule which applies to language allowing mailing within a specified number of days, as does S.C. CODE ANN. § 38-35-110 (1976). The courts hold that by establishing a specific notice period, insurance companies imply that the insured must receive the notice for it to become effective.

357. 526 F. Supp. 94 (D.S.C. 1981).

the insurer."³⁵⁸

A case factually similar to *Edens II* is *Anchor Casualty Co. v. Crisp*.³⁵⁹ There, the insured's five-year fire insurance policy was cancelled for nonpayment of premium by written notice mailed on June 10, 1959. On November 18, 1959, the insured's house was totally destroyed by fire. The insurance company refused to pay because of its purported cancellation prior to the loss. The insured claimed never to have received the cancellation notice. The court held that the policy was in effect at the time of the fire because the cancellation was invalid.³⁶⁰ The cancellation clause of the policy was similar to that of *Edens*' policy. The Texas court stated, "This [cancellation] clause is clearly distinguishable from those permitting an insurer to cancel the policy ' . . . by mailing written notice to the insured's address,' or similarly phrased clauses."³⁶¹ When "mailing" is specified, the court continued, actual receipt is not required; however, when "mailing" is not specified, actual receipt is a condition precedent to cancellation. The court also applied the "settled rule" that actual receipt is also a condition precedent to cancellation when a policy requires a certain number of days' notice.³⁶²

Clearly, *Edens II* followed the majority rule for policies containing the "giving notice" wording. The court in *Edens I* believed it was following the South Carolina rule as enunciated in *Moore*, reasoning that "giving written notice" was substantially similar to "mailing notice." The majority of courts, however, interpret and define the terms differently. *Edens II* thus conformed to each of the two fact patterns which trigger the requirement of

358. *Id.* at 96 (citing *Sherrod v. Farmers Mut. Fire Ass'n*, 139 N.C. 167, 51 S.E. 910 (1905)).

359. 346 S.W.2d 364 (Tex. Civ. App. 1961). Another similar case is *Rocque v. Cooperative Fire Ins. Ass'n of Vt.*, 140 Vt. 321, 438 A.2d 383 (1981), in which the court stated that, "Even where facts show that a cancellation notice was mailed to the insured, if the policy demands that notice be 'given' and the notice was never received, the notice is ineffective as a valid cancellation." *Id.* at 325, 438 A.2d at 386. In *Pence Mortgage Co. v. Stokes*, 559 S.W.2d 500 (Ky. Ct. App. 1977), a Kentucky court interpreted "giving notice" and "mailing notice." When "giving notice" is required to effect cancellation under a policy, the insurance company has the strict burden of proving, as a condition precedent to any cancellation, actual receipt of notice by the intended recipients. When the policy requires "mailing notice," the cancellation is effective when mailing has been proven. *Id.* at 506.

360. 346 S.W.2d at 367.

361. *Id.* (emphasis added).

362. *Id.*

actual receipt as a precondition to cancellation because (1) no form for the notice was specified, and (2) the insured was given a specified number of days' notice.

In the future, insurance companies which seek to cancel their policies merely by mailing a notice of cancellation must specify by the terms of their policies that cancellation is to be effected by mailing notice to the address of the insured as it appears in the policy. Insurers should also be aware that a court may follow the minority rule in those cases in which the policy specifies mailing and a certain number of days for cancellation to become effective. The court in *Edens* seemed to approve of notices sent by registered mail, thus suggesting a potentially viable alternative in South Carolina. Until the legislature passes a statute governing the cancellation of fire insurance policies in South Carolina, insurance companies must draft their cancellation clauses carefully, and free of all ambiguity, to prevail in litigating policy cancellations.

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